

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

74-1580

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 74-1580

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

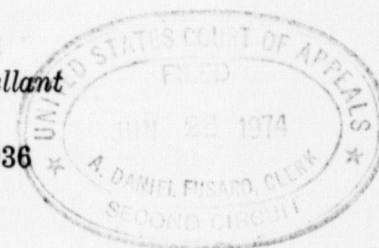
SAMUEL KAPLAN

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S APPENDIX

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*Page numbers as in original
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DOCKET ENTRIES

THE UNITED STATES

vs.

SAMUEL KAPLAN

WEINSTEIN, J.

72 CR 851

PROCEEDINGS

7-11-72 Before DOOLING, J. - Superseding indictment filed.

7-25-72 Before Dooling, J. - Case called - Deft. & counsel John Pollok by J. Hoffman present - deft. arraigned and enters a plea of not guilty - bail continued.

7-25-72 Notice of Appearance filed.

7-26-72 Government's notice of readiness for trial filed.

9-18-73 Before TRAVIA, J. - Case called and adjd. to 9/24/73 - Counsel Jeffrey Hoffman is relieved.

9-24-73 Before Travia, J. - Case called & adjd. to Oct. 5, 1973 for Trial.

10- 5-73 Before TRAVIA, J. - Case called - Adj. to 10/26/73 for trial.

10-12-73 Before TRAVIA, J. - Case called - Marked ready for trial on Nov. 5, 1973.

11- 5-73 Before TRAVIA, J. - Case called & adjd. to Nov. 16, 1973 for disposition.

11-16-73 Before TRAVIA, J. - Case called & adjd. to 12-7-73 for disposition - bail continued.

12- 7-73 Before TRAVIA, J. - Case called - adjd. to 12-14-73 on consent.

12-14-73 Before TRAVIA, J. - Case called - adjd. to 2-1-74 to set trial date.

1-17-74 Stenographers transcript filed dated November 16, 1973 (placed in 72 CR-31).

2- 1-74 Before TRAVIA, J. - Case called - Deft. and counsel present - Case marked rea(illegible) subject to case on trial before Judge Weinstein.

2- 8-74 Before WEINSTEIN, J. - Case called - Deft. and counsel present - Trial ordered and begun - Jurors selected and sworn - Trial contd. to 2-11-74.

2-11-74 Before WEINSTEIN, J. - Case called - deft. & counsel James La Rossa present - trial resumed - deft. moves for dismissal of the indictment and for Judgment of Acquittal - denied by the court - defts renews motion for dismissal - court denied the application. On application of counsel for deft Indictment 72 CR-31 is dismissed as to both defts - Jury retires for deliberation at 3:45 PM - Order of Sustenance signed - Jury retires for at 9:00 PM to resume its deliberation. Trial contd. to Feb. 13, 1974.

2-11-74 By WEINSTEIN, J. - Order of sustenance filed. (Dinner)

2-13-74 Before WEINSTEIN, J. - Case called - deft. & counsel James La Rossa present - Jury resumes deliberations at 10:00 am - Jury returns and renders a verdict of guilty as to count 1 and 2 - Jury polled and discharged - trial concluded. - deft. reserves motions - Bail revoked and

deft. remanded.

- 2-22-74 Before WEINSTEIN, J. - case called - bail motion adjd. to Feb. 25, 1974 at 9:45 am.
- 2-25-74 Before WEINSTEIN, J. - case called - deft. & counsel J. La Rossa present - defts motion for bail argued and granted - 2 letters marked as Court Ex. 1 and 2 - bail set at \$100,000 secured by \$2500 in cash - deft. wife and mother-in-law to sign bond and friends house to be put up as security.
- 2-25-74 By CATOGGIO, Magistrate - Order for acceptance of cash bail filed.
- 3- 6-74 4 volumes of stenographers transcripts filed. (pgs. 1 to 252.)
- 4-19-74 Before WEINSTEIN, J. - case called - deft & counsel present - sentence adjd. to 4-26-74.
- 4-26-74 Before WEINSTEIN, J. - Case called - Deft. & counsel Mr. La Rossa present - Deft's motion disputing the probation report - Hearing ordered and begun - Hearing concluded - Deft. sentenced to imprisonment for a period of 8 years pursuant to T-18, U.S.C., Sec. 4208 (a)(a) on each of counts 1 and 2 to run concurrently.
- 4-26-74 Judgment and Commitment filed - certified copies to Marshal.
- 4-29-74 Notice of appeal filed.
- 4-29-74 Docket entries and duplicate of notice of appeal mailed to court of appeals.
- 5- 8-74 Letter chambers from James M. La Rossa dated 5-6-74 filed re: mistrial and request for hearing on 5-8-74 at 9:30 AM So Ordered by Judge Weinstein.

5-8-74

Before WEINSTEIN, J. - case called - deft. &
counsel James La Rossa present - defts motion
to set aside the verdict is denied.

A TRUE COPY
ATTEST

DATED: 5/9/1974

LEWIS ORGEL

CLERK

BY /s/ (illegible)

DEPUTY CLERK

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

-against-

No. 72 CR 851

SAMUEL KAPLAN,

Defendant.

-----X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 6th day of January 1972, within the Eastern District of New York, the defendant SAMUEL KAPLAN, did possess, with intent to distribute, approximately 25.6 grams of heroin, a Schedule I narcotic drug controlled substance.

(Title 21, United States Code, §841(a)(1)
Title 18, United States Code, §2)

COUNT TWO

On or about the 6th day of January 1972, within the Eastern District of New York, the defendant SAMUEL KAPLAN,

knowingly and intentionally did distribute approximately
25.6 grams of heroin, a Schedule I narcotic drug controlled
substance.

(Title 21, United States Code, §841(a)(1) and
Title 18, United States Code, §2)

A TRUE BILL

Foreman

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X

4 UNITED STATES OF AMERICA :

5 VERSUS : 72-CR-851

6 SAMUEL KAPLAN, :

Defendant :

7 -----X

8
9 United States Court House
Brooklyn, New York

10
11 February 8, 1974
10:00 o'clock A.M.

12
13 B e f o r e :

14 HONORABLE JACK WEINSTEIN, U.S.D.J.

15
16 A p p e a r a n c e s :

2

17
18 EDWARD J. BOYD, V., ESQ.,
United States Attorney for the
Eastern District of New York

19
20 BY: KENNETH KAPLAN, ESQ.,
Assistant United States Attorney

21
22 JAMES LA ROSSA., ESQ.,
For the Defendant

23 HENRI LE GENDRE
24 ACTING OFFICIAL COURT REPORTER
25

1 (Whereupon, a jury was empanelled and Sworn in.)

2 THE COURT: Ladies and Gentlemen, you will hear
3 the Openings in the case. This is not evidence. This
4 is the most important part of the case, however, it
5 will help you understand little pieces of evidence as
6 they come in if you will give careful attention to
7 counsel. Please proceed, Gentlemen.

8 MR. KAPLAN: Good afternoon, your Honor, Mr.
9 LaRossa, Ladies and Gentlemen of the Jury:

10 As you know, my name is Kenneth Kaplan, I'm an
11 Assistant United States Attorney. As Assistant United
12 States Attorney, it is my responsibility and privilege
13 to present the evidence and argue this case for the
14 United States Government.

15 Now, before the Government presents its evidence
16 on that witness stand, I'm afforded an opportunity of
17 giving an opening statement. Now, this opening state-
18 ment is a broad and general outline of the Government's
19 case and the evidence that is to follow, and as such,
20 it's an opportunity for me to advise you, the jurors,
21 exactly what the Government intends to prove with respect
22 to the Indictment filed in this case.

23 Now, there has been an Indictment filed, and I
24 am going to read it to you.

25 "United States of America against Samuel Kaplan,

1
2 defendant. Count One. One or about the 6th day of
3 January, 1972, within the Eastern District of New York,
4 the defendant Samuel Kaplan, did possess with intent to
5 distribute approximately 25.6 grams of heroin, a Schedule
6 I, Narcotic Drug Controlled Substance, citing the rele-
7 vant statutory authority, Title 21 of the United States
8 Code, Section 841(a)(1), and Title 18, United States Code,
9 Section 2, which is the statute having to do with aiding
10 and abetting, procuring, commanding or inducing the act
11 of selling heroin, or possessing heroin.

12 Count Two. On or about the 6th day of January,
13 1972, within the Eastern District of New York, the
14 defendant Samuel Kaplan, knowingly and intentionally did
15 distribute 25.6 grams of heroin, a Schedule I Narcotics
16 Drug Controlled Substance, citing the same statute of
17 the United States Code, same sections.

18 You might say, how is the Government going to
19 prove this case. Basically, Ladies and Gentlemen, there
20 will be one witness for which we are going to prove that
21 Samuel Kaplan was dealing in heroin, that witness is
22 Nicholas Alleva, a Special Agent with the Drug Enforce-
23 ment Administration, previously known as the Bureau of
24 Narcotics and Dangerous Drugs.

25 You are going to learn from the testimony of

1
2 Agent Alleva that he met Samuel Kaplan and another
3 individual known as Frank Lang in Lang's apartment on
4 January 6, 1972. Lang is now deceased. You will learn
5 that Alleva met with the two individuals, and they had
6 certain conversations about heroin, about the quality of
7 heroin. You learn through the course of Mr. Alleva's
8 testimony that Frank Lang was acting at the direction,
9 at the behest of this man sitting right here, Samuel
10 Kaplan, the defendant.

11 You will learn that Agent Alleva purchased approxi-
12 mately 25.6 grams of heroin from the defendants Lang
13 and Kaplan on January 6, 1972.

14 It's not necessary to go into the conversations
15 between the three men in that room, but you look at
16 Agent Alleva very carefully, every word he's going to
17 say in this case is going to be very important to you.

18 Possession and sale are two crimes charged in
19 the Indictment. You'll find it is not necessary, and
20 Judge Weinstein will so Charge you on the law, it is
21 not necessary to prove that defendant Kaplan actually
22 touched the drugs and handed them to Agent Alleva. The
23 Government proof then basically will show that Mr. Kaplan
24 was acting as a supplier for Mr. Lang. Mr. Lang was
25 Mr. Kaplan's lackey, he was his boy. That's what you

1
2 in this case will come from the witness stand, and any
3 Exhibits that are allowed to be introduced in evidence
4 and shown to you.

5 The Indictment that Mr. Kaplan just read to you
6 has no evidentiary value of any kind. It's a form of
7 pleading. It's filed in the Court, shown to the defend-
8 ant, apprises him of the charges against him, and when
9 he stood up and pled Not Guilty to that Indictment, a
10 question of fact arose. That's our judicial system.

11 We then say that the burden sits at the Govern-
12 ment's table to prove each and every essential element
13 of each and every Count, beyond a reasonable doubt.
14 If they do not, you, by your Oath, have agreed that you
15 will not convict Mr. Kaplan. That's what it's all about.
16 He has no duty. I did not get up and open to you, it's
17 by choice.

18 Now, Mr. Kaplan read the Indictment that said
19 United States of America against -- Now, he and I can't
20 take on the United States of America, that's not what
21 it's all about. It's a form of pleading. United States
22 of America means each and every one of us, including the
23 Court Reporter who takes down words. You are here to
24 determine Mr. Kaplan's innocence or guilt, and I'm not
25 here to ask for sympathy, or beg for him, or anything

1
2 will learn during the course of the testimony. And all
3 that is asked of you at this time as jurors is that you
4 evaluate all the testimony in this case with a fair and
5 open mind. If that's followed, I'm confident that
6 justice will prevail in this case.

7 Thank you very much.

8 MR. LA ROSSA: May it please the Court, Mr. Kaplan,
9 Mr. Foreman, Ladies and Gentlemen of the Jury:

10 As you probably are aware, my name is La Rossa,
11 I represent Samuel Kaplan, who sits here and is the de-
12 fendant in this case.

13 Now, each of us has a particular role in this
14 proceeding which is very, very important for the parties.

15 Judge Weinstein sits and controls the law in this
16 courtroom, he decides what the law is. He tells you
17 what the law is, and you, by virtue of your Oath, have
18 agreed to follow that law. Mr. Kaplan and I are advocates,
19 we represent a particular client in the courtroom, and
20 you, by virtue of your willingness to serve as jurors,
21 have been swept into our judicial system, and from this
22 moment on will become what we call the sole and exclusive
23 triers of the facts.

24 The words that I speak to you, or words that Mr.
25 Kaplan speaks to you are not evidence. The only evidence

else, because that's not what our system is all about.

I'm here to tell you that after you hear all the testimony here, you're going to find that no one was a lackey; no one was acting under his control. You'll find out why he was at those peemises that day. You'll find out how long he knows Mr. Lang; how he knows Mr. Lang; that they worked together for many years as carpet layers for a place called Kaufman Carpets. You'll find for two years Mr. Kaplan did side carpet laying jobs, and would employ this young man; that they became friendly; that he was there visiting him socially, and had nothing to do with what occurred on that particular day.

Now, you were asked an awful lot of questions on the voir dire about whether the fact that this is a narcotics case would create a problem for you. Now, please understand that those questions were asked of you just to determine whether or not you have a completely closed mind. We are not here to sell you on the idea that narcotics aren't bad; that they are not a problem in today's society. That's not what it's all about, and that's not why the questions were asked of you.

The questions were asked of you, whether or not you can judge Mr. Kaplan, based upon the evidence in this case, without any overriding prejudice. That's all

1 they ask. You are not going to hear a lot of talk about
2 his children and his family and his background. You're
3 not going to be asked for sympathy to let him go back to
4 his family, based upon those factors.
5

6 Let me stop what I'm not going to ask you to do,
7 and tell you what I'm going to demand from you on behalf
8 of Mr. Kaplan. When you stood at one point, and the
9 Judge or the Clerk Swore you in as the jury, you all
10 raised your hands and Swore to try this case in accord-
11 ance with the law and facts. That's what I demand for
12 Mr. Kaplan, just as you would want if you were sitting
13 there, or one of your family was sitting there, nothing
14 more, nothing less.

15 If after hearing all of the evidence in this case
16 you believe that there is no reasonable doubt here that
17 Mr. Kaplan has violated the law as the Indictment reads,
18 it is your duty to come in here and say he's guilty.
19 But by the same token, if after hearing all of the evi-
20 dence and the arguments and the law, you believe there
21 is a reasonable doubt as to Mr. Kaplan's guilt here, you
22 must come back into this courtroom and find him Not
23 Guilty. That's what we want, nothing more and nothing
24 less.

25 I ask for two things, it's going to be a short

trial, your full attention and a completely open mind until the end, because when you hear all the evidence, you necessarily will have to have a doubt which will rise to the proportion of being a reasonable doubt, and you will have to send Mr. Kaplan home. Two things, open mind, in accordance with your Oaths, and nothing more.

Thank you for your attention.

THE COURT: Ladies and Gentlemen, will you excuse us, wait for us in the jury room. I have a legal problem I want to take up with counsel.

(Whereupon, the jurors were excused from the courtroom.)

THE COURT: Yes?

MR. KAPLAN: Again, your Honor, to reiterate the argument that was made before the luncheon recess. It's required by the Government to show that a statement must be made during the pendency of the conspiracy, but it's submitted that subsequent events may be taken into consideration by the Court in analyzing whether that statement was made during the furtherance of the conspiracy in question.

THE COURT: Yes, that's so, but the mere fact here that the defendant appeared with narcotics or in a narcotics setting later, in view of the plus --

1 MR. KAPLAN: Your Honor, I'll indicate the Pucco
2 case --

3 THE COURT: I've read it.

4 MR. KAPLAN: -- is quite similar.

5 THE COURT: In Pucco I can't believe that's all
6 there was, because Lombard properly points out at page
7 1108, 476 Federal Reporter, Second, that the generally
8 accepted rule, not only in the Second Circuit, but else-
9 where, has been where "the Judge is satisfied by inde-
10 pendent evidence that the defendant was a party to a
11 conspiracy, what another member said during the course
12 of the conspiracy," et cetera.

13 Now, the opinion doesn't discuss the point of
14 whether there was any other evidence of the independent
15 -- any other independent evidence of this conspiracy.

16 MR. KAPLAN: Is your Honor referring to the peti-
17 tion on rehearing, or the original --

18 THE COURT: Any place in the opinion. There is
19 no indication that that was the only evidence of the
20 conspiracy, and I'm not going to read it that restric-
21 tively.

22 MR. KAPLAN: The evidence on the conspiracy as
23 far as the instant case is concerned, the facts concern-
24 ing the meeting between the three individuals, and that's
25 what your Honor has to determine to establish whether

1 conspiracy existed. I think we have to work from the
2 conspiracy back, rather than --

3 THE COURT: I don't know when the conspiracy was
4 entered into. Do you know when the conspiracy began?

5 MR. KAPLAN: It's hard in any case to pinpoint
6 it, when a conspiracy begins.

7 THE COURT: Did it begin a day before, a week
8 before, the morning of the meeting, when?

9 MR. KAPLAN: Your Honor, I do have other informa-
10 tion that might corroborate this statement. It's prior
11 to the meeting between Kaplan and Lang and Alleva.

12 THE COURT: If you have some evidence apart from --

13 MR. KAPLAN: Lang did state to Alleva --

14 THE COURT: I don't want Lang's statements, be-
15 cause they are all hearsay.

16 MR. KAPLAN: Well, Lang's other statement, which
17 is corroborated by certain facts concerning the defend-
18 ant Kaplan. I think that might shed light on the issue.

19 THE COURT: Tell me what it is.

20 MR. KAPLAN: Lang told Alleva that his man, or
21 his connection, was in Florida the week before. Now,
22 we can establish, I believe, that Kaplan was, in fact,
23 in Florida during that week. I think that tends to cor-
24 roborate that the man or connection is Kaplan.

25 THE COURT: That may be true as far as Lang is

1 concerned. What evidence do we have that Mr. Kaplan
2 agreed with Mr. Lang to enter this conspiracy?

3 MR. KAPLAN: We have the meeting between the
4 three of them.

5 THE COURT: When was the arrangement made? Lang
6 may have had in his mind, I'm going to enter into a
7 conspiracy as soon as Kaplan gets back if Kaplan okays
8 it, but when did they get together and enter into that
9 conspiracy?

10 MR. KAPLAN: Without hearsay statements, it's
11 very difficult to determine. In most cases I would
12 direct your Honor's attention to United States versus
13 Gainey, which says in cases such as this -- should admit
14 the hearsay statements, subject to connection. May times--

15 THE COURT: That's true, but you have to have a
16 proffer of proof. I would let it in subject to connec-
17 tion, but you can't tell me any connection that you are
18 going to offer.

19 MR. KAPLAN: It seems to me all the Government is
20 required to do -- an Agency relationship existed between
21 Kaplan and Lang.

22 THE COURT: At the time the statement was made.
23 What statement do you have aside from the hearsay state-
24 ment?

25 MR. KAPLAN: I would again respectfully differ

1 with your Honor's interpretation that an Agency relation-
2 ship need be proven at the time the statement is made.
3 I think your Honor has to look from the time the arrange-
4 ments are committed, looking backwards.

5 THE COURT: You have to agree that the conspiracy
6 has to exist at the time of the statement. Do you agree
7 to that?

8 MR. KAPLAN: Yes.

9 THE COURT: It has to be during the course of
10 the conspiracy. You have to prove that there is a con-
11 spiracy in existence at the time the statement was made,
12 don't you?

13 MR. KAPLAN: That's correct.

14 THE COURT: You have to do it by evidence apart
15 from the hearsay statement.

16 MR. KAPLAN: That's correct.

17 THE COURT: What evidence do you have?

18 MR. KAPLAN: Again, I would direct your Honor's
19 attention to the subsequent act.

20 THE COURT: But they --

21 MR. KAPLAN: They tend to prove the validity of
22 the statement, your Honor.

23 THE COURT: We're not trying to prove the validity
24 of the statement. If I let it in, for whatever weight
25 the jury wants to give it, I have to have independent

1 evidence that there was a conspiracy in effect at the
2 time that the statement was made.

3 MR. KAPLAN: As an alternative grounds, as an
4 offer of proof, I would submit in any event the state-
5 ment would be admissible not as an exception to the
6 hearsay rule, but generally to show the facts and cir-
7 cumstances of the purchase in question.

8 THE COURT: Res gestae?

9 MR. KAPLAN: That's right.

10 THE COURT: We don't apply res gestae here. We
11 require more precise --

12 MR. KAPLAN: I don't know what your Honor would
13 like to call the rule, but I would submit that its rele-
14 vant for the jury to understand Alleva's dealing with
15 Kaplan. Excuse me, Alleva's dealing with Lang, because
16 Lang is an intimate part of the case. Since he's not
17 available, I think the Weber case in the Third Circuit,
18 1973, says, Where the conspirator is dead, the Govern-
19 ment is entitled to greater latitude in these matters.

20 THE COURT: I'll give you all the latitude in the
21 world if you can prove to me there was a conspiracy in
22 existence at the time the statement was made.

23 MR. KAPLAN: It might be in the nature of a verbal
24 act.

25 THE COURT: Might be.

1 MR. KAPLAN: It might be admissible on that basis.

2 THE COURT: No. It has to be admissible, if it's
3 admissible at all, on a theory that Lang and Kaplan had
4 come to an understanding before this conversation of
5 Land with the Government Agent. You could argue under
6 Mutual Life Insurance Company v. Heldman with respect to
7 intention, but I'm not going to apply that rule, because
8 I think it's too expansive an application of the rule.

9 I agree with you that the opinion of Judge
10 Feinberg appears to say what you say it says, but I be-
11 lieve that Judge Feinberg is too careful a Judge to have
12 made such a radical change in the rules of hearsay, with-
13 out discussing it.

14 MR. KAPLAN: I would submit --

15 THE COURT: Particularly since his Law Clerks
16 were well trained in evidence.

17 MR. KAPLAN: Particularly on the petition for the
18 hearing Judge Friendly and Judge Lombard criticized
19 Judge Feinberg's rule in that it was too constructing,
20 they would apply the more traditional rule. If your
21 Honor applies the traditional rule in this case as would
22 be applied by Judge Friendly or Judge Lombard, I think
23 it would be beyond the scope of Judge Feinberg's opinion
24 in that case.

25 THE COURT: I understand your point. I just don't

1 believe that's the rule. If it is the rule, it would
2 seem to me to be in conflict with the confrontation rule
3 of the Constitution. It would be interesting to look
4 at the record. If you get the record on appeal on this
5 case, and you look at it, I would like to look at it
6 myself. I don't believe that's what it holds. Do you
7 think that's what it holds?

8 MR. LA ROSSA: Absolutely not. I think the rule
9 in this Circuit has been annunciated dozens of times
10 that you must prove defendant's participation in the
11 conspiracy.

12 THE COURT: I think there are some cases indicat-
13 ing that he takes the conspiracy with the statement.

14 MR. KAPLAN: He adopts the prior statement.

15 THE COURT: But this is a two-man conspiracy.
16 That's your problem.

17 MR. KAPLAN: As an alternative offer of proof,
18 I would ask it be admitted not for the truth of the
19 matter that he was connected, but part of the statement
20 of Alleva's dealing with Lang, I see nothing unusual
21 about that. If your Honor would so direct the jury --

22 THE COURT: It's a perfectly sound approach,
23 except I don't believe the jury can make the distinc-
24 tion as a practical matter.

25 MR. KAPLAN: But the matter is crucial for the

1 Government's case in trying to put before the jury what
2 kind of dealings Alleva had with Lang, and what Alleva
3 was doing with Lang the next day.

4 MR. LA ROSSA: This is crucial to the Government's
5 case; that means on Six, they cannot prove Mr. Kaplan to
6 be a participant in the two substantive Counts of the
7 charge which doesn't make any --

8 MR. KAPLAN: I didn't say it was that crucial.

9 MR. LA ROSSA: You used the word crucial.

10 THE COURT: You can show they had a discussion
11 about the sale of narcotics.

12 MR. KAPLAN: About a subsequent meeting.

13 THE COURT: Not with Kaplan.

14 MR. KAPLAN: Not with Kaplan, but with his connec-
15 tion. If your Honor would instruct the jury that it's
16 not to be taken for the truth, that Kaplan was the con-
17 nection, it could have been anyone.

18 MR. LA ROSSA: Judge, if you do that, aren't you
19 putting one other person in the room right smack into
20 this thing, based upon Lang's statement some days before
21 this?

22 THE COURT: The trouble with that is, there has
23 to be some exception to the hearsay rule, because it's
24 hearsay.

25 MR. KAPLAN: That's a verbal act, possibly it's

1 going to prove Lang's state of mind in his dealings
2 with Alleva. I think it's quite relevant in this regard.

3 THE COURT: It could be argued that way. You
4 could develop that theory. I don't think the jury could
5 accept it in a non-hearsay way. I think they would be
6 bound to treat it as a hearsay declaration; in effect,
7 that he intended to meet with Kaplan, and it can't be
8 used that way. It's a tough problem. It would be inter-
9 esting what the Court of Appeals will say on it.

10 MR. KAPLAN: Again, it's submitted on the basis
11 of Pucco, that it would allow such a statement to come
12 in.

13 THE COURT: But Pucco treats it as a hearsay
14 statement, not as a verbal act, and I believe if you
15 analyze the record in Pucco, which we don't have before
16 us, it must be some independent -- if there isn't, then
17 I have a serious doubt whether it's right.

18 MR. KAPLAN: If we could --

19 THE COURT: It creates a revolution in the field
20 on hearsay.

21 MR. KAPLAN: If we created it in that case would
22 your Honor read it?

23 THE COURT: Is that a two-man conspiracy?

24 MR. KAPLAN: Yes, Gonzalez and Pucco. I spoke
25 with Mr. Gross, who tried the case.

1 MR. LA ROSSA: The subsequent retrial was after
2 the first trial, where Pucco was reversed, and it seems
3 to me it was a large conspiracy case involved initially,
4 then Pucco was --

5 THE COURT: If you have multiple conspiracy which
6 is existing and somebody else comes in later, he takes
7 everything up to that point. That's a different proposi-
8 tion. That's not what we have here.

9 MR. KAPLAN: Would your Honor reconsider in the
10 light of the record in Pucco?

11 THE COURT: No, I won't. If that's what Pucco
12 said, then Pucco is wrong, and I'm not going to make a
13 wrong decision. If that were the issue in the Court of
14 Appeals, they would have discussed it at length. It
15 can't be. Check Pucco and get the full report in the
16 earlier case. All right, let's go ahead.

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18 (continued on next page.)
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THE COURT: Call your witness, please.

MR. KAPLAN: Government calls Nicholas Alleva.

N I C H O L A S A L L E V A, being duly sworn by the Clerk
of the Court testified as follows:

MR. KAPLAN: I ask that these documents be
marked as 3500 Material, your Honor.

THE CLERK: Government's Exhibit 1, 2 and 3 for
identification.

DIRECT EXAMINATION

BY MR. KAPLAN:

Q Sir, by whom are you employed?

A United States Department of Justice, Drug
Enforcement Administration.

Q In what capacity?

A Special Agent.

Q Is the Drug Enforcement Administration known
by a previous name?

A Yes, it was previously known as The Bureau of
Narcotics and Dangerous Drugs.

Q How long have you been so employed?

A Approximately three years.

Q What are your duties as a special agent?

A One of my primary functions is to act in an
undercover capacity.

Q Tell the jury what you mean by an undercover

capacity?

A By acting undercover you assume some other identity and try to either purchase narcotic drugs as evidence or gather intelligence by associating with certain alleged criminals. This is done --

MR. LA ROSSA: I object and move this be stricken.

THE COURT: Strike it. This defendant is presumed to be innocent.

Q Now, I direct your attention to January 6th, 1972, and some months prior thereto, were you acting as an undercover agent on those dates?

A Yes.

Q Did you have occasion to meet with one Frank Lange?

A Yes, I did.

Q When did you first meet with him?

A It was in November of 1971.

Q And what was your relationship to Mr. Lange?

A We had certain business dealings.

Q What was the nature of the business dealings?

MR. LA ROSSA: Objection.

MR. KAPLAN: Did your Honor rule on that?

THE COURT: Sustained.

Q Did there come a time when you received anything from Mr. Lange?

A Yes.

MR. LA ROSSA: Objection.

THE COURT: Why?

MR. LA ROSSA: It has nothing to do with the 6th day of January. I object to it.

THE COURT: Yes, fix the date.

Q What date are we talking about, November what of 1971 -- November 28th?

A Yes sir.

MR. LA ROSSA: I object to anything that occurred on November 28th.

THE COURT: I'll allow it in, ladies and gentlemen, only to show the relationship of this witness to the defendant Lange, bearing in mind that this has nothing to do with this defendant.

Q Now, sir, you had certain business dealings with Mr. Lange?

A Ye sir, I did.

Q On November 29th, 1971?

A Yes, I did.

Q And on what other dates?

A Various dates in November and December, that we

had certain verbal dealings. We had no actual business transaction take place.

Q How many times did you meet with Mr. Lange and conduct certain business?

MR. LA ROSSA: Objection.

THE COURT: I'll allow that. Go ahead.

A We met approximately four times.

Q And did you conduct business those four times?

A No, actual transaction once, but during that time negotiated.

Q We are talking prior to January 6, 1972?

A Yes.

Q And did there come a time when you received something from Mr. Lange?

A Yes.

Q What was it that you received?

MR. LA ROSSA: Objection.

THE COURT: I'll allow it.

A I received approximately one ounce of a white powder.

Q Did there come a time --

THE COURT: Fix the date.

Q When was the first time you received the ounce of white powder?

A November 28th, I believe it was.

Q Did there come a time that you submitted that for a laboratory analysis?

A Yes, we did.

Q Did you have occasion to have a telephone conversation on January 5, 1972 with Mr. Lange?

A Yes, I did.

Q As a result of that conversation what did you do?

A As a result of that conversation I went to the residence of Frank Lange the following day, January 6th, at about 2:00 O'clock in the afternoon.

Q Had you previously been to his residence?

A Yes, I had.

Q Can you tell us where that is located?

A Yes; in Brooklyn, New York.

Q Give us the exact address, if you can recall?

A 193 Homecrest Avenue, Brooklyn, New York.

Q And what is the nature of the residence?

A It's a one family home, I believe owned by Lange's parents.

Q And when you got there on January 6, 1972, did someone meet you at the door?

A Yes.

Q Who was that?

A Lange's mother let me in the door.

Q Did there come a time when you met Lange?

A Yes sir.

Q Where did you meet him with regards to the residence?

A As I was coming in the door he was coming down the stairs from his upstairs bedroom.

Q Did he greet you?

A Yes, he did.

Q What, if anything happened subsequent thereto?

A He bid me to follow him upstairs to the bedroom, which I did. We walked up the stairs and walked into his bedroom.

Q Had you previously been inside his bedroom?

A No sir.

Q First time --

A Yes sir; I had been in there once before.

Q So this is the second time?

A Second time.

Q Will you please describe the bedroom for us, generally?

A He had no actual bed in the room. It was a mattress on the floor with pillows propped up against the wall where the head of the mattress or head of the bed would

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2 be. There were a couple of pieces of furniture, a bureau,
3 a small night dresser, posters and psychedelic lighting, plus
4 regular lamps, a regular lamp.

5 Q Besides yourself and Mr. Lange, was there any
6 other person in the bedroom?

7 A On January 6th; yes sir, there was.

8 Q Who was that person?

9 A Defendant Samuel Kaplan.

10 Q And where was he located in the room?

11 A He was in a position on the mattress, half
12 lying down and half sitting.

13 Q Will you tell us how he was dressed?

14 A Yes sir, he had on a white tee shirt, not the
15 strap type but a regular men's undershirt commonly referred
16 to as a skivvy shirt and denim dungarees.

17 Q By the way, was there any introduction of you
18 to Mr. Kaplan?

19 A No, there was not.

20 Q Did you say anything? Was anything said at
21 that time by Mr. Lange or by yourself?

22 A Lange and I both exchanged mutual hello greetings.
23 At this point Lange walked to the night table, I guess you
24 would call it, a small piece of furniture with a drawer in
25 it and he removed from there a transparent baggie, plastic

1 baggie type container with white powder inside.

2 Q Is this similar to the type of substance or bag
3 containing the substance that you had received on prior
4 occasions?
5

6 A Yes, it was.

7 Q What, if anything happened?

8 A Lange began to approach me with the package.
9 We discussed the money briefly and I looked at Defendant Kaplan
10 lying or half seated on the mattress. I said to both of them;
11 "Either one of you or both of you --

12 MR. LA ROSSA: Objection.

13 THE COURT: Tell us what you said first and
14 then you can elicit how he said it physically.

15 Q Tell us what you said at that particular point
16 in time?

17 A I said, "Either one of you or both of you are
18 going to have to come down with me to get the money."

19 Q And whome were you looking at at that time?

20 A As I was making the statement I looked at both
21 individuals, from one to the other.

22 Q When you say the money, you're talking about
23 official Government funds to purchase narcotics?

24 A Yes sir.

25 Q Where was that money?

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A The trunk of an official Government car parked outside.

Q Now, after you made the statement to Lange and Kaplan, what was the response of the two individuals, if any?

A The response of Lange was nothing. He turned to Kaplan. Kaplan asking why they had to go down and get the money.

Q Who did he direct that statement to?

A To me.

Q Defendant Kaplan directed it to --

A To me.

Q He said what?

A "Why do we have to go down and get the money."

Q What did you say?

A I said, "Because you guys beat me once, you're not going to do it again."

Q Agent Alleva, you have experiences in the drug trade and drug traffic?

A Yes sir.

Q How many buys would you say you made over the years?

A Give a rough estimate, between 40 or 50 I would say.

Q And when you use that term "beat me", what is

meant specifically by that term?

MR. LA ROSSA: Objection.

THE COURT: I'll allow it.

A It has one of two actual connotations. It could mean that a package is a pure quality or it could mean that there was some shady transaction with the money or the individual gave a package -- was about to give a package instead of giving a package -- just give a package, take the money and steal the package back. Somewhere where there was not a legitimate business transaction.

Q And you directed this to both Kaplan and Lange?

A Yes, I did.

Q And in this context, what does "beat" refer to?

MR. LA ROSSA: Objection.

THE COURT: Sustained.

Q After you said "You guys beat me once and you're not going to do it again," what was the reaction of Kaplan and Lange?

A Lange again turned to Kaplan lying in that position, not really lying, and Kaplan said -- motioned to him -- "All right, go down and get the money."

Q And what was Lange's response to Kaplan's direction?

A He began to move.

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Q Were you to go down and get the money?

A He began to move towards me. I did not move at this point.

Q What did you say at that time?

A I wanted to inquire about the quality, so I asked how good it was, what kind of quality did this package have.

Q Who did you ask?

A I asked Kaplan, the defendant Kaplan.

Q What did you say?

A I asked how good is this package.

Q Did he indicate a response?

A Yes, he did.

Q What did he say?

A He said "It's five hit stuff. I hit the same stuff five times myself."

Q It's "five hit stuff." Is that drug terminology?

A Yes, it is.

Q Tell the members of the jury in your own experience as a drug agent, what it means "five hit stuff."

A When narcotics are purchased on what we would term on a wholesale level, they are purchased at a certain quality, purity. The more times that you can dilute or hit or cut or whack or step on a package, the better the value of

the package. Now, it's one ounce. If you can whack it, hit it, step on it five times you have now created five ounces -- anywhere from five to six ounces from the one ounces you just purchased. If an item is one hit, it denotes less pure quality, less percentage of accurate narcotic drug; in this case heroin. If it's a five or six hit, it means the percentage on active ingredient is a higher percentage then it is with a one hit or one whack time.

Q What do you do with narcotics if you hit them or dilute them?

MR. LA ROSSA: Objection.

THE COURT: I'll permit it so they can understand what is going on here. Go ahead.

A IF an individual is a wholesaler -- in my particular situation, acting as a wholesaler of narcotic drugs --

MR. LA ROSSA: Objection, move that it be stricken.

MR. KAPLAN: The testimony he's an expert witness.

MR. LA ROSSA: He's testifying to this particular incident and he is describing what he believes it to be.

THE COURT: Ask him in more general terms what one ounce of five hit stuff represents in the narcotics

business.

Q Can you tell us concerning any general ounce of narcotics or heroin, what would be done with it after it's hit as the term is used in this case?

A In this particular instance when that one ounce is made into five or six ounces, it can then be sold individually as an ounce to someone else who will then either put another hit on it or another cut on it and then bag it into what is commonly called a nickel bag or dime bag.

Q What is a nickel bag, what is a dime bag?

MR. LA ROSSA: Objection.

THE COURT: I think they have to understand the stream of commerce to understand the transaction. Go ahead.

Q What's a nickel bag and what's a dime bag?

A A nickel bag, both terms commonly referred to as a fix would be a five dollar purchase of narcotics; and a dime purchase, a ten dollar purchase of narcots.

Q What was the value of the substance negotiated for in this case?

A The actual price was \$1300 for that particular ounce.

(continued on next page)

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2 Q That was what was going to be turned over,
3 \$1300?

4 A Yes sir.

5 Q What happens if you hit it five times?

6 A Then you can make approximately six ounces which
7 could be sold anywhere from five to eight hundred dollars an
8 ounce of cut.

9 Q Now, as the term is used "hit" is it also tested
10 for its purity? Can that also be a meaning of hit?

11 MR. LA ROSSA: I'll object to it being well
12 beyond the point of describing one sentence to a jury.

13 THE COURT: I think we are sufficiently apprised
14 by the meaning of that sentence. You may continue.

15 Q After Mr. Kaplan made this statement to you
16 that he hit it, or cut it five times himself, what, if anything
17 did you do?

18 A At this point then I turned to leave the bedroom
19 with Lange to go down to the Government car to complete the
20 activity.

21 Q What happened when you got downstairs with
22 Mr. Lange?

23 A We got into the Government car and I took the
24 package. He gave me the package and I performed what we
25 called a field test on the white powder for the presence of

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2 narcotic drugs. The field test proved positive, meaning that
3 there was a rough indication that there was narcotic drugs
4 present in the white powder.

5 Q After you performed the field test with Mr. Lange,
6 what, if anything happened?

7 A I took the package and placed it into the console
8 of the car and closed it and told Lange I would have to get out
9 of the car to go to the trunk to pay him for the powder since
10 the money was in the trunk of the car.

11 Q Did you go outside the car and open up the
12 trunk?

13 A As I got out of the car and began opening the
14 trunk the other agent realizing that I had just given the
15 signal for the arrest, arrested both Lange and myself.

16 Q And when you say you were arrested, explain to
17 the jury what that means?

18 A In a situation like this, there are times when
19 to continue the investigation or for whatever reasons, the
20 undercover agent is arrested also or arrested in "to give the
21 idea to the defendant that number one, the agent is not an
22 agent or not an informant, if there is some details that have
23 to be worked out after the arrest for whatever reasons. There
24 are some times that an agent is actually again arrested."

25 Q When you were arrested did you happen to see

the narcotics be seized by a fellow agent?

A Yes.

Q Did you have occasion on that day to initial the bag?

A Yes.

MR. KAPLAN: I'll offer it for identification.

THE CLERK: Government's Exhibit 4 marked for identification.

Q I show you what has been marked as Government's Exhibit 4 for identification and ask you if you can identify it by your initials on the bag?

A Yes, I can.

MR. KAPLAN: I'll offer the exhibit, pursuant to stipulation, your Honor. I would ask at this time that the stipulation be read.

MR. LA ROSSA: May I see it?

MR. KAPLAN: You may.

MR. LA ROSSA: I have no objection to the stipulation being read.

THE COURT: Read it, please.

MR. KAPLAN: This is a stipulation between counsel for the Government and counsel for the defendant.

It is hereby stipulated, consented to and agreed

1
2 by and between the undersigned that Exhibit marked
3 as Government's Exhibit 4 for identification is a
4 white powder containing heroin, a Schedule 1 Narcotic
5 Drug having a weight of 25.6 grams, and two, this
6 exhibit has remained in the exclusive custody and
7 control of the Bureau of Narcotics and Dangerous Drugs
8 also known as the Drug Enforcement Administration from
9 the time of its receipt as heretofore testified to by
10 Mr. Alleva until production in this courtroom today.

11 I now offer it in evidence, your Honor.

12 THE COURT: Admitted.

13 THE CLERK: Exhibit 4 previously marked for
14 identification received in evidence.

15 DIRECT EXAMINATION

16 BY MR. KAPLAN CONTINUED:

17 Q By the way, Agent Alleva, can you describe
18 Mr. Lange to us, his physical characteristics?

19 A This is again two years ago. He was approximately
20 24 years of age at that time, thin built, long hair; I would
21 say about five foot five, five six, thin frame.

22 Q You say long hair, describe how long?

23 A Down to his shoulders, shoulder length.

24 MR. KAPLAN: I ask this be marked for
25 identification.

THE CLERK: Government's Exhibit 5 marked for identification.

MR. LA ROSSA: Your Honor, I require a side bar for a moment.

THE COURT: All right.

(Whereupon side bar conference was had.)

MR. LA ROSSA: Mr. Kaplan is about to offer this death certificate.

MR. KAPLAN: A copy of a death certificate.

MR. LA ROSSA: I'm not raising foundation questions. I see no reason to submit a death certificate to this jury which one, Looking at cause of death "Pending further study" which indicates it's not a normal death.

THE COURT: Why are you introducing this?

MR. KAPLAN: To show the unavailability.

THE COURT: Not that he's unavailable, he's dead.

MR. KAPLAN: Maybe they will conjecture --

MR. LA ROSSA: I so stipulate that the witness Lange, or Defendant Lange, however you want to put it, that Mr. Lange is unavailable at this time to be a witness in this case.

THE COURT: Does that suffice? He's a co-

defendant in this case.

MR. LA ROSSA: Sam Kaplan is named alone,

THE COURT: He is.

MR. KAPLAN: He was a co-defendant.

MR. LA ROSSA: That is not the indictment before this Court and Mr. Kaplan is alone as a defendant.

MR. KAPLAN: He's also named or mentioned throughout the testimony your Honor as a co-conspirator, as an aider and abettor.

COURT REPORTER: Your Honor, there was mention made in the opening statement that Mr. Lange was dead.

THE COURT: No objection was made.

MR. LA ROSSA: I couldn't have, it was done already.

THE COURT: All right.

(Whereupon side bar conference was concluded.)

THE COURT: Mr. Lange, ladies and gentlemen is not available, don't speculate on why.

MR. KAPLAN: I have no further questions, your Honor.

MR. LA ROSSA: I'm afraid I can't begin examination at this time.

MR. KAPLAN: May we have a side bar.

THE COURT: You need a ten minute recess.

MR. LA ROSSA: I haven't analyzed the material.

THE COURT: Take a ten minute recess, ladies and gentlemen.

(Whereupon jurors were excused.)

MR. KAPLAN: May the record reflect that I'm turning over all 3500 exhibits.

THE COURT: And I must say that I find it objectionable turning them over in the presence of the jury.

MR. KAPLAN: It was not my intention --

THE COURT: The Second Circuit ruled that's improper. First of all the Chief Judge in the Second Circuit stated that Assistant United States Attorneys cooperate with the Court in these cases by turning over 3500 Material in advance.

MR. KAPLAN: Mr. La Rossa had all the statements of Mr. Kaplan where Mr. Kaplan was mentioned in this case many months ago.

THE COURT: He's entitled to have them in advance.

MR. KAPLAN: That was 3500 Material that was turned over prior -- most of it relates to prior meetings between Lange and Alleva.

THE COURT: It's futile to argue with you.

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2 MR. KAPLAN: I also turned over the Grand Jury
3 Exhibits.

4 THE COURT: If you had turned it over this
5 morning we could have avoided this break.

6 MR. KAPLAN: That's not the reason for the
7 break. Mr. La Rossa wants these logs that I ask your
8 Honor to examine in camera.

9 MR. LA ROSSA: It was dropped on my desk when
10 you started direct examination.

11 THE COURT: We started this case late, Mr. La Rossa.
12 was here quite early. You know he's involved in a
13 difficult case and he put the case on today at my
14 consent in order to help Judge Travia's case. I
15 don't understand why the United States Attorney
16 persists in this nonsense.

17 MR. KAPLAN: The fact of the matter is that
18 Mr. La Rossa requested these particular logs this
19 morning.

20 THE COURT: The logs are a different thing,
21 but I don't know why you couldn't give them 3500
22 Material. He's not a member of the Mafia. May I
23 have the logs? What shall I do with it? What dates
24 are you interested in? I have a jury here, and there
25 is a storm outside and I have to fiddle around with

11

this thing.

MR. LA ROSSA: November 29th.

THE COURT: January --

MR. LA ROSSA: January 6th, December 3rd, January 5 -- frankly, I would like to see everytime from November 29th until January 6th when Mr. Lange's name appears in the sheet; since he was allowed to testify that he met him on a number of occasions.

MR. KAPLAN: These logs contain very confidential information.

MR. LA ROSSA: You look through them and tell me.

MR. KAPLAN: I just had the opportunity to see these.

MR. LA ROSSA: I I can't see them --

MR. KAPLAN: I'll look at them to determine what dates might be relevant.

THE COURT: Why don't you look through them and give him an excerpt showing any reference to Mr. Lange.

MR. LA ROSSA: That's all I want, or Kaplan.

THE COURT: I think he's entitled to that. This is the main witness. I think you're going to have to do it. I think we'll have to break the trial.

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2 It's twenty after three, we have a storm outside.
3 I don't think it's fair to have the jury here. I
4 think we'll break for the day. Sit down and get that
5 material and give it to him. It seems to me there
6 should be more cooperation amongst counsel.

7 MR. KAPLAN: He made the request today.

8 THE COURT: All right, I accept that, that's
9 a reasonable response. Do you have any objection to
10 letting the jury go in view of the storm?

11 MR. KAPLAN: No objection.

12 MR. LA ROSSA: No objection.

13 THE COURT: Bring in the jury, please.

14 (Whereupon jurors reentered the courtroom
15 now seated in the jury box.)

16 THE COURT: Ladies and gentlemen, there is a
17 storm outside as some of you know, and my information
18 is that it may get worse, rather than keep you here
19 I think it might be best to break now and have you
20 come in Monday.

21 Can we start at 9:30 Monday? Can you all be
22 here at 10:00 O'clock? Don't discuss the case at all,
23 check in downstairs but be here at 10:00 O'clock in
24 the jury room. I may have another case I'm working
25 on, I may be a few minutes delayed but I'll try to be

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2 prompt. If any of you are absent or late you'll have
3 to wait around, I'd like to finish the case Monday
4 because we have other business. Don't discuss the
5 case with anyone, keep an open mind, have a pleasant
6 and safe weekend. Goodnight.

7 (Whereupon jurors were excused.)

8 THE COURT: Anything further, gentlemen?

9 MR. KAPLAN: Nothing further, your Honor.

10 THE COURT: I have looked at the earlier cases
11 in Puko, it looks like it's a two person
12 conspiracy. It looks like it. See if you can get the
13 record on appeal and see if there is any other evidence.
14 It's hard for me to believe that that's the decision
15 but my mind is opened.

16 MR. KAPLAN: I'm convinced the instant case
17 falls within Puko. If Lange was here as a defendant
18 there still wouldn't be a confrontation, it would come
19 in.

20 THE COURT: In Puko, Gonzales had already
21 been convicted, so he was available to be called as
22 a witness by defendant which changes a little bit,
23 not from a technical point of view. It doesn't
24 make any difference. I'll consider it, take a look
25 at the record. I must say I'd be very surprised if

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2 the Second Circuit took that position that it could be
3 used a hearsay declaration. In Puko it was used but
4 not as a verbal act, as you say, but as hearsay.

5 MR. KAPLAN: As your Honor is aware in the
6 petition for rehearing it was very strange language
7 about Judge Feinberg's opinion that it might be too
8 narrow.

9 THE COURT: But not on this point; on another
10 point. I'm always going to learn. Thank you.
11 Goodnight.

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S/LH 1
1 (The following occurred in the absence of any
2 jury.)

3 THE COURT: Have you had an opportunity to
4 examine the material?

5 MR. LA ROSSA: Yes sir, I have.

6 THE COURT: Are you prepared now?

7 MR. LA ROSSA: Yes, your Honor.

8 MR. KAPLAN: I will turn over a copy of
9 surveillance reports of earlier sales involving Lange
10 and Mr. Alleva.

11 I would represent that those are not 3500
12 Material but I turned them over as a matter of courtesy.

13 MR. LA ROSSA: I had an opportunity to read
14 those --

15 MR. KAPLAN: I would turn these over at this
16 time and have them marked as 3500 Exhibits.

17 THE COURT: Thank you for your cooperation,
18 Mr. Kaplan.

19 Did you get a chance to look at the record on
20 appeal in that case.

21 MR. KAPLAN: Your Honor, I have notified
22 Mr. Gross of the Southern District. He's going to
23 have it made available. Perhaps today.

24 THE COURT: Well, it's going to be too late.

25 MR. KAPLAN: I will try to get it over here.

1 I called him late on Friday but there was not
2 much we could do.

3 THE COURT: Did you find any cases, Mr. La Rossa?

4 MR. LA ROSSA: No, I consulted my -- the
5 position of the Law Clerk is as your Honor stated.

6 THE COURT: Well, that is on general principles,
7 but I think it may not be true in the Second Circuit.

8 MR. KAPLAN: I would again make another offer of
9 proof, and I don't know whether it would be relevant
10 to do it at this time or perhaps subsequent to the
11 Court's examination by Mr. La Rossa. It might be that --

12 THE COURT: Well, do it now so we can avoid
13 breaks in the trial.

14 MR. KAPLAN: If your Honor recalls the testimony
15 of Agent Alleva it was that:

16 "... You guys beat me once already..." directed
17 to Kaplan and Lange.

18 Kaplan's response was "All right go down with
19 him." Which was an unusual response under the
20 circumstances indicating that he had some pre-knowledge
21 of "You guys beat me" and I would rely upon the cases --
22 well, primarily Mutual Life Insurance vs. Hillman,
23 which is 145US285.

24 To paraphrase Hillman:

25 Independant and explanatory or corroborative

1 evidence is often indispensable to the true administra-
2 tion of justice. Such declarations are regarded as
3 competent as any other testimony when irrelevant to
4 the issue. Their truth or falsity is an inquiry for
5 the jury.

6 And there is a case cited in Hillman, a New
7 Jersey Supreme Court Case, the highest court in New
8 Jersey, pertaining to a statement or declaration by
9 the victim of a murder, that he was going to a certain
10 place. And that was properly admissible at that
11 trial as a natural part of the transaction to show that
12 the defendant was to appear in the company of the victim.
13 I think we have circumstances quite like that in this
14 case, your Honor.

15 THE COURT: Yes, but all of those cases are
16 highly suspect though and have been severely criticized

17 MR. KAPLAN: I also refer your Honor to the
18 many annotations in your own text book which bear on
19 this issue.

20 THE COURT: Yes, I know.

21 MR. KAPLAN: If there ever was an application
22 of this Hillman rule it would certainly be in this
23 case, your Honor.

24 THE COURT: Well, Hillman has been seriously
25 criticized in its use for this purpose because it

1 assumes that the other party did confer earlier. So
2 in that respect it is a hearsay statement, not only
3 with respect to what will happen in the future, but
4 implied as to what happened in the past, namely, in
5 this case Mr. Kaplan conferred with me, Mr. Lange,
6 and agreed that he would be there tomorrow.

7 So it is a hearsay statement looking both forward
8 and backward. And as you know, Mr. Justice Cardozo
9 says you can look forward but not backward.

10 It's a very difficult problem --

11 MR. KAPLAN: Perhaps your Honor would --

12 THE COURT: But I think the Second Circuit has
13 been very liberal in permitting this kind of thing to
14 come in. So I propose to allow it in after consulting
15 with my learned colleagues on the bench who all agree
16 that it should come in with a limited instruction to
17 the jury that they cannot infer from this statement
18 that there had been any relationship between Kaplan
19 and Lange, or that Kaplan agreed to do anything with
20 Lange, or that Lange had Kaplan in mind when he made
21 this statement.

22 It is being offered only so that they can better
23 understand, if they believe the agent, the agents
24 reaction, to what Lange was saying in this room. In
25 appreciating what Lange's reaction was and what the

1 agent's reaction, apart from that of Mr. Lange, this
2 evidence, if it accredited, may be used. But it may
3 not be used in its hearsay sense.

4 I am afraid that is what Second Circuit wants
5 in this kind of case.

6 MR. LA ROSSA: Your Honor, may I respond to this?

7 THE COURT: Yes.

8 MR. LA ROSSA: The 3500 Material is quite specific
9 in that Lange tells the agent that he has three or four
10 sources of these things and one is drying up after
11 another.

12 I most respectfully submit that in allowing this
13 in, and what we are talking about being six or seven
14 weeks before --

15 MR. KAPLAN: No, it was the day before.

16 THE COURT: No, it was the day before.

17 MR. KAPLAN: This is a telephone conversation
18 the day before when he says that my connection will
19 be there.

20 THE COURT: Well, if it were six or seven weeks
21 before of course I would not let it in because it's
22 relevance would be so slight. But it is the day before
23 that makes what he did understandable. Otherwise it
24 is unlikely he would have gone in and spoken so openly.

25 MR. LA ROSSA: Well, you will not my objection

1 to this your Honor.

2 THE COURT: Yes.

3 Do you have any cases?

4 MR. LA ROSSA: I have no cases other than the
5 general principle that we must prove the conspiracy
6 not by the hearsay evidence --

7 THE COURT: I'm not allowing it in as hearsay.
8 I reject the Government's conspiracy theory, with all
9 due respect --

10 MR. LA ROSSA: Well, with all due respect -- I
11 am sorry. Had you completed your statement?

12 THE COURT: -- but Judge Feinberg in the Puco
13 case -- I do not believe that we should allow the
14 exception to be pushed as far as it was pushed in
15 that case, assuming there was no independant evidence.

16 I think you can still justify it on the ground
17 that subsequent activities can be used to infer a
18 prior agreement. In this case I would be warranted,
19 based on my following the testimony of the agent, and
20 based upon how he described Mr. Kaplan's reaction, in
21 believing independent of the hearsay that there was
22 a prior existing conspiracy and that it is hardly
23 likely that it existed at least one day in advance of
24 the event.

25 So I think in this case I would be entitled

1 to allow it in as a hearsay exception under the
2 conspiracy rule or under the Hillman Doctrine.

3 But I think in order to protect the defendant
4 fully I will give a limiting instruction not permitting
5 them to use it for hearsay purposes.

6 MR. LA ROSSA: With all due respect I just
7 think that in just using the normal language of the
8 Bruton decision this jury is in no position to
9 distinguish that rule of law.

10 THE COURT: Well, Bruton has nothing to do with
11 this. It is a prior statement and Bruton is --

12 MR. LA ROSSA: No, no. I am referring to the
13 Court's language in Bruton saying that a jury can't
14 be sift out one thing from another like that.

15 I submit to you the same thing applies here.
16 You are telling them they can't use it by virtue
17 of the conspiracy but they have to hear it -- this is
18 a very short trial. It is a very, very short trial.

19 THE COURT: Well, I do not see how the jury
20 could really understand what this agent was doing
21 here if they didn't know what was in his mind and what
22 the thought was in Lange's mind. Otherwise the whole
23 thing is bizarre.

24 MR. LA ROSSA: I have no objection to their
25 bringing out a prior transaction. But I have objection

1 to them saying -- Lange testified that he is waiting
2 for his connection to come in from Florida and his
3 connection will be there that day.

4 THE COURT: He didn't say Florida, did he?

5 MR. ALLEVA: Not on that phone call. He had
6 said in the prior phone call --

7 THE COURT: How long prior was that?

8 MR. ALLEVA: I would have to consult with my --

9 THE COURT: Well, look at your notes.

10 As I understood it the only statement on that
11 telephone call was that I expect my connection to be
12 there.

13 MR. LA ROSSA: It is your Honor's ruling then
14 that you are restricting him to the January 5th
15 conversation.

16 THE COURT: Yes, subject to my hearing what
17 the proffer is.

18 MR. ALLEVA: Your Honor, on January 3rd he had
19 said that his people were still in Florida.

20 And on the 5th when I spoke with him he said
21 that the connection -- that I should be at his residence
22 at 2:00 P.M. the following afternoon, and that Lange's
23 connection would be there with an ounce of heroin.

24 THE COURT: Kaplan was in Florida earlier?

25 MR. LA ROSSA: Yes sir.

1 THE COURT: I am going to exclude the statement
2 of the 3rd.

3 Again I believe there are theoretical and
4 practical grounds for admitting it but I do not think
5 that the jury can consider it in a nonhearsay way.

6 And certainly on the third, it seems to me, it
7 is stretching things a little too far to find that the
8 conspiracy existed then. So it would not come in on
9 the conspiracy theory. Hillman would be stretching it
10 much too far.

11 MR. LA ROSSA: So the offer is made now and
12 your Honor's ruling is restricting it to the 5th, the
13 conversation on the 5th.

14 THE COURT: I think they have to have that in
15 order to understand what this agent was doing here and
16 how he reacted because otherwise, as I say, the
17 defendant could argue and should argue that it would
18 be just be bizarre for a man to come into a home that
19 way and act in this somewhat arrogant amnner that the
20 agent described. But in the context of a prior
21 discussion with Lange his actions do make sense. So
22 they can't even evaluate the credibility of this
23 witness without having that evidence.

24 If you want a further limitation without waiving
25 your exception that you think will be more protective

1 of your client, write it out and I will consider it.

2 MR. LA ROSSA: Yes sir.

3 THE COURT: I understand that by submitting
4 such a limiting instruction you do not waive your
5 general objection to allowing it in at all.

6 Anything further?

7 MR. KAPLAN: No.

8 THE COURT: I would like to see the Second
9 Circuit record on appeal.

10 MR. KAPLAN: Certainly, your Honor.

11 THE CLERK: 3500 Material has been marked
12 Court's Exhibit 4.

13 (Documents referred to were received and marked
14 3500-4.)

15 THE COURT: All right, thank you. We will go
16 ahead then.

17 Are you ordering the transcript in this case?

18 MR. KAPLAN: No, I am not.

19 MR. LA ROSSA: Your Honor, Mr. Alleva, as you
20 know, is going to be the major Government witness on
21 this case.

22 My understanding is that Mr. Kaplan has a short
23 witness immediately following and is going to rest.

24 (continued on next page)

1 (The following continued to be heard in the
2 absence of the jury.)

3
4 MR. LA ROSSA: My application is to exclude
5 Mr. Alleva from the courtroom. There is a very good
6 chance he will be recalled on direct -- on the
7 defense case. And I frankly do not think he should
8 sit at the counsel table during the whole Government's
9 case. It lends a certain amount of credibility,
10 sitting at counsel table.

11 THE COURT: If it is objectionable he can sit
12 at the front bench and you can consult with him from
13 there.

14 MR. KAPLAN: Well, as your Honor knows, the
15 Court of Appeals has been fairly consistent in
16 allowing the case agent, the one who is most able to
17 assist the Assistant U.S. Attorney, to sit right next
18 to him.

19 THE COURT: All right.

20 MR. KAPLAN: It is quite important to have
21 him, your Honor, just as Mr. LaRossa has the
22 defendant next to him to discuss things with him, I
23 could, if need be, require Mr. Alleva.

24 THE COURT: You say, you can't try the case
25 without having him next to you?

2 1 MR. KAPLAN: I would say that it makes for a
2 more orderly presentation of the case in a jury trial,
3 your Honor.

4 THE COURT: All right, on your representation.
5 Bring in the jury.

6 (The jury thereupon returned to the courtroom
7 at 10:50 o'clock A.M.)

8 N I C H O L A S A L L E V A , called as a witness,
9 having been previously duly sworn, resumed the stand
10 and testified further as follows:

11 THE CLERK: You are still under oath.

12 What is your name?

13 THE WITNESS: The first name is Nicholas.

14 N-i-c-h-o-l-a-s Alleva, A-l-l-e-v-a.

15 THE CLERK: Thank you very much. You are still
16 under oath.

17 THE COURT: Good morning, ladies and gentlemen.

18 We will continue now with this witness.

19 DIRECT EXAMINATION

20 BY MR. KAPLAN (Cont.):

21 Q Agent Alleva, as you may recall, Friday you
22 were asked questions about the January 6, 1972 meeting
23 between Lange and Kaplan and yourself.

24 There was some testimony about you saying at
25 that time:

Alleva-direct

"You guys beat me."

MR. LA ROSSA: I object to the form of this question. I do not think it is a question.

THE COURT: Sustained.

Q Now, Agent Alleva, did you have a conversation with Frank Lange on the day previous, January 5, 1972?

A Yes, sir, I did.

Q And where did this conversation take place?

A It took place over the telephone.

Q Did you call him or did he call you?

A I called him.

Q And can you tell us what you said to him and what did he say to you?

MR. LA ROSSA: Objection.

THE COURT: I am going to sustain that objection to a limited extent.

Now, ladies and gentlemen of the jury, as I understand the witness is going to tell you something that Mr. Lange told him over the phone that preceding day.

Mr. Lange is not available to be cross-examined so that this defendant does not have his constitutional right to confront this person and to cross-examine him before you so you could watch him.

Alleva-direct

1
2 I am allowing this testimony therefore to come
3 in only so that, assuming you find it to be true, and that
4 is entirely up to you, you will better understand what
5 was in this witness' mind when he went to the home of
6 Mr. Lange; is that clear, and what, if you believe him
7 to be telling the truth, he expected to find there so
8 that you can evaluate the activities of this defendant
9 -- of this witness and the others in the room. But
10 you are not to assume and you may not use this
11 evidence to find that there had been any prior
12 conversations between Mr. Lange and the defendant.
13 Is that clear? There is no evidence at all of that
14 from anything that this witness now describes to you.

15 We don't know what was in Mr. Lange's mind and
16 he is not here to tell us. It is only being intro-
17 duced so that you will understand what was in this
18 witness' mind when he went into that room.

19 Any other further limitation?

20 MR. LA ROSSA: Nothing further, your Honor.

21 THE COURT: Thank you.

22 BY MR. KAPLAN:

23 Q You had a conversation with him over the phone;
24 is that correct?

25 A Yes, sir, that is correct.

Q Tell us what you said to him.

A I asked him about the quality of the next purchase.

And he said the quality would be very good.

I asked him when and where, how we could, you know, perform the next purchase.

He told me that I should be at his residence at 2:00 p.m. the following day, which would be January 6, at 2:00 p.m., and his connection would be there with him.

Q Where was that?

A I am sorry?

Q Where was that he and his connection was supposed to be?

A At this residence which was 1939 Homecrest Avenue in Brooklyn.

Q Now, did you have any conversation with him about the previous quality of the substance in question?

A At that particular day?

Well, when I asked him about the quality of the subsequent purchase I told him that it had better be better than the original purchase.

Q What was your experience with the original purchase?

MR. LA ROSSA: Objection.

Alleva-direct

THE COURT: Sustained to a limited degree.

Again, ladies and gentlemen, there is no evidence whatsoever that this defendant had anything to do with any prior transaction that this witness may have had with Mr. Lange.

I am allowing this evidence in only so that you can understand better what was in the witness' mind and perhaps in Mr. Lange's mind so you can better understand what was happening the next day if you credit his testimony.

But there is no evidence whatsoever that this defendant had anything to do with any prior transaction or with Mr. Lange prior to the day in which he was actually in the room with Mr. Lange.

Do you wish any further instructions?

MR. LA ROSSA: No, sir.

Q Agent Alleva, would you answer the question?

What was your experience with the prior substances that you had received?

A Well, the quality of the first purchase was extremely poor, a low percentage in heroin on the first ounce that I purchased from Mr. Lange.

Q Did you make any statements to him in regard thereto?

7 1
2 A Yes. As I just stated, I told him the quality
3 of the second purchase had better be better than the first one.

4 MR. KAPLAN: Thank you very much. No further
5 questions.

6 CROSS-EXAMINATION

7 BY MR. LA ROSSA:

8 Q Mr. Alleva, are you the case agent on this
9 particular case?

10 A Yes, sir, I am.

11 Q By being the case agent does that mean,
12 Mr. Alleva, that you have complete supervision over that
13 particular case?

14 A No, sir, it doesn't.

15 Q Does it mean that you made most of the reports,
16 for example?

17 A Yes.

18 Q Does it mean that you are the one who confers
19 with the Assistant U.S. Attorney?

20 A I don't understand what you mean. Prior to,
21 during, after the investigation? I have no --

22 Q Completely throughout. Aren't you the one
23 who will talk to the U.S. Attorney as the case agent prior to
24 making an arrest and that in fact you do talk to him?

25 A Not in all circumstances.

Alleva-cross

Q Did you in this case?

A No, sir. I conferred with my group supervisor.

Q After indictment is returned do you retain any kind of control over the case?

MR. KAPLAN: I object as to relevancy on the grounds that there is nothing to be shown in the question that relates to this particular case.

THE COURT: I take it it is on credibility?

MR. LA ROSSA: Yes.

THE COURT: You may inquire.

THE WITNESS: Will you please repeat the question?

Q After indictment is returned is the case agent the one who retains control over that particular case?

A Yes and no. There are instances when the case agent doesn't retain control and where a group supervisor takes some of the load.

Q How about this case? Did you retain any control?

A After the indictment?

Q Yes.

A Partially, yes.

Q Did you confer with the United States Attorney after the indictment at all?

A Which indictment is that?

Q This indictment.

A Yes, I did.

Q Did you see the indictment when it was returned?

A No, I did not.

Q Did you ever read it?

A No, I did not.

Q Is a copy ever put into your files?

A No, it wasn't.

Q Is it ever?

A In certain instances. Not in all cases.

Q Isn't it the normal practice for the case agent to come and get a copy of the indictment and put it into the Bureau's file?

A I have never done it, no.

Q Tell me, sir, before you became an agent did you receive any schooling at the Government's expense?

A Pertaining to what?

Q Being an agent.

A Oh, yes, sir.

Q When you went to this particular school were you taught various things which would help you in your future life as an agent?

A Yes, sir.

Q Was one of those things how to testify in court?

A I would say to an extent, yes, sir.

Q Well, is there any question about that?

A Well, you can't tell somebody how to answer the truth. The truth is the truth.

Q But you were taught how to convince a jury.

MR. KAPLAN: Objection, your Honor, as conclusory and also irrelevant.

THE COURT: I will allow it.

MR. LA ROSSA: I am sorry?

THE COURT: You may continue.

Q You were taught how best to convince a jury as a witness, weren't you?

A I would hesitate in answering that yes because I was never taught how to convince a jury.

I was taught that there were certain procedures where you answer a question directly and to the point. You conducted yourself in a professional manner as all agents of the Federal Government must conduct themselves. But as far as testifying, you testify to the truth.

Q Were you told to look at the jury when you testify?

A I looked at whomever I speak.

1 Q I asked you whether you were told, sir, to look
2 at the jury.

3 MR. KAPLAN: I object to what he was told.

4 THE COURT: I will permit it to a limited degree.

5 Q Were you?

6 A I don't recall.

7 Q Do you recall anything about what you were taught
8 about how to be a witness in a trial?

9 A I just answered that question, sir.

10 Q Let me ask you this: Were you taught anything
11 about acting in an undercover capacity?

12 A Yes, I was.

13 Q And did you tell us that you acted undercover on
14 some forty different occasions?

15 A Approximately.

16 Q And on each of those occasions you assumed another
17 role, did you not?

18 A No, sir.

19 Q Well, on each of those occasions did you assume
20 the role of a buyer of narcotics?

21 A You asked me if I assumed -- I am sorry --
22 another role, not any other roles other than my own.

23 Q Your own is a federal agent, is it not?

24 A Yes, sir.

Q And on each of those forty occasions you set out to convince someone not that you were a federal agent but a purchaser or seller of narcotics?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q And on each of those occasions you assumed a new identity, did you not?

A No, sir. I assumed the same identity.

Q Used the same name?

A Not my personal name, but another name, but the same name constantly.

Q Other than your own name?

A Another last name. The same first name.

Q You also dressed in a manner that you believed would convince someone.

A I dressed the same way I always dressed.

Q The same as you do now?

By the way, did you ever convince anyone on any of those forty different occasions --

MR. KAPLAN: I object. It calls for a conclusion on the part of the witness.

THE COURT: I will allow it.

MR. KAPLAN: How does he know whether he

convinced anyone?

THE COURT: Whether he thinks he convinced anyone.

MR. KAPLAN: It is very suggestive.

THE COURT: Of course.

Q Did you convince all those people as to the role that you were playing?

A Well, after they were arrested their constant remark was, "I never should have sold to you. I knew you were the man."

So if you consider that convincing them or not convincing them, that is your decision to make, sir.

Q But you know in your own heart that you are pretty good at convincing these people, right?

MR. KAPLAN: Objection, your Honor, on the same grounds.

THE COURT: I will allow this. Bring it to a close.

Q Is that right, Mr. Alleva, on those 40 different occasions you were successful in those instances?

A I wouldn't say in every instance.

Q Almost all of them?

A Some of them.

(continued next page)

Alleva-cross

72

Q By the way, where were you on December 3, 1971?

A Where was I?

I was with Mr. Lange.

Q Were you talking about narcotics?

A Yes I was.

Q Did you buy any narcotics from him?

A At that time, no sir.

MR. LA ROSSA: Will you mark this please.

Q Did you see Mr. Kaplan on December 3rd?

A No, I did not.

Q Did you talk to him on December 3rd?

A No, I did not.

Q Had you ever seen or talked to Mr. Kaplan
prior to January 6th, 1972?

A No sir, I did not.

MR. LA ROSSA: Would you mark that please.

THE CLERK: Two page document marked for
identification as Defendant's Exhibit A.

So marked.

(Document referred to, consisting of two pages,
was received and marked Defendant's Exhibit A and
marked for identification.)

Q Are you aware that on January 11, 1972 an
indictment was filed in this Court against Mr. Kaplan?

A Yes, I am.

Q Are you aware that one count of that indictment charges that On Decmeber 3rd, 1971, Mr. Kaplan distributed apprximately 25.6 grains of heroin?

A I am aware that a mistake was made in that indictment.

Q I didn't ask you that. I asked you whether you are aware that indictment was filed charging Mr. Kaplan with a sale on December 3rd?

A I was made aware of that subsequent to that, yes sir.

Q You have seen this before, haven't you?

A No, I haven't seen this.

Q And never saw that indictment before?

A I saw the minutes of the Grand Jury where I testified.

MR. LA ROSSA: I offer this into evidence.

THE COURT: Any objection?

MR. KAPLAN: No objection your Honor.

THE CLERK: All right, may I have that please.

Defendant's A previously marked for identification now marked in evidence.

(Document referred to having previously been marked Defendant's Exhibit A for identification was

now received and marked defendant's Exhibit A in evidence.)

Q Do you know, sir, that from January, 1972 until July, 1972 this charge stood against Mr. Kaplan charging him with the sale on December 3, 1971?

A Yes sir.

Q Just a mistake?

A By whom I don't know, sir.

Q Certainly not by you? Right, Mr. Alleva?

A I make mistakes.

Only the Pope is infallible.

Q Now, let's talk about January 6th for a moment. Do you remember coming into that house on

Homecrest?

A Yes.

Q Who let you into the house?

A Lange's mother.

Q And did you ever see her before?

A When I was at the residence I might have seen her inside the house not knowing who she was.

Q Was there anyone else in the house besides Lange, his mother and Mr. Kaplan?

A I have no idea.

Q Did you see Mr. Lange's sister?

1 A I did not.

2 Q Did you see a man or a woman in the house at
3 that time other than the people that you have described?

4 A I did not, no sir.

5 Q You used the expression, Mr. Alleva, "5 hit stuff."
6 You said that Mr. Kaplan said that in that room? Right?

7 A Yes sir.

8 Q Did you ever make out a report where you stated
9 that Lange said exactly the same thing back in November, 1971?

10 A Did I ever make a report?

11 Q Yes.

12 A Yes sir. You have it.

13 Q Did that report say that Lange used the
14 expression, "5 hit stuff"?

15 A Yes sir.

16 Q You are absolutely sure he said it that day?
17 There is no question in your mind.

18 A No question at all, sir.

19 Q By the way, after you and Lange left the
20 building on Homecrest Avenue, how many agents were outside?

21 A Counting myself, sir?

22 Q Yes.

23 A Eight.

24 Q And did they break into the wrong house,
25

5

Alleva-cross

Mr. Alleva?

A Did they break into the wrong house?

Q Yes. After you gave them a signal to make an arrest.

A It is possible, sir. I wasn't aware of it; I was being arrested.

Q Now, as you sit here now, Mr. Alleva, do you know whether they broke into the wrong house on that block?

A I was told that they did.

Q There is no question in your mind that they knocked the door off the wrong house? Isn't that right?

MR. KAPLAN: I object to it. It has nothing to do with this witness.

THE COURT: I will allow it.

Q (Continuing) Did they?

A I was told -- I don't know about knocking the door off. But I was told they went into the wrong door.

Q Did they attempt to arrest the people in the wrong house?

A No, they didn't attempt to arrest people in the house. They were looking for the individual that I informed them was in the upstairs apartment or the upstairs bedroom.

Q Now tell me, sir, and tell the jury how many

times you and any of these surveillance agents were on Homecrest in front of Mr. Lange's house prior to January 6th?

A I don't know how many times the surveillance agents were there. I can't testify to how many times they have been there.

Q Haven't you read the reports? You are the case agent, aren't you?

A I'm not going to testify as to how many times they were on Homecrest Avenue. I can tell you how many times I was there.

Q Can you tell me how many times your reports indicate that surveillance agents were in front of that house?

MR. KAPLAN: Objection as hearsay testimony.

THE COURT: I will allow it.

A If I can review my notes I can see.

(Documents handed witness.)

A (Continuing) I do not have the report of the arrest since the agents differ -- there are several agents.

Agent Clifford Rayburn was there twice.

Agent Frank Chellino was there once.

Group Supervisor Harry P. Weinkauff was there twice.

Special Agent Joseph Vigna was there three times.

And Special Agent Larry Burstein was there twice.

Special Agent Thomas E. Scott, not present for the arrest, was there twice.

Special Agent Michael Dunham, not present for the arrest, there twice.

Special Agent Joseph Brzostowski, not present for the arrest was there once -- I am sorry, twice.

United States Marshall Jim Conway, Eastern District of New York, not present for the arrest there once.

That is the best I can do for you.

Q Did you go back into the premises on Homecrest Avenue after the simulated arrest?

A That day? No sir.

Q Now, do you remember telling us on Friday that you went into the premises, that Lange walked over to a dresser drawer, pulled out what appeared to be plastic envelopes or plastic carriers of some sort with white powder in it?

A Yes.

Q After some talk the two of you went downstairs into the vehicle that you were driving and he handed it to you and you tested it?

A Yes sir.

Q Is that the way it happened?

A To the best of my knowledge, yes.

Q Didn't he give you that in the room?

1
2 A In what room?

3 Q In the bedroom upstairs?

4 A No sir.

5 Q He didn't?

6 A No sir.

7 Q Are you sure of that?

8 A Yes sir.

9 Q Didn't you write in your report that he handed
10 you this plastic bag and you said, "That's more like it. It
11 feels like an ounce, " up in the room?

12 A May I refer to my report?

13 Q Don't you remember what you wrote in your report?

14 A No I don't. May I refer to it?

15 Q Before we refer to it is that the way it
16 happened?

17 A I don't know.

18 Q Did he hand you that plastic bag in the bedroom
19 and did you say after holding it, "This seems more like it.
20 This seems more like an ounce"?

21 A I don't recall.

22 Q Is it true?

23 A May I refer to my report?

24 Q Is it true?

25 A I don't recall.

1
2 Q Is it true that he handed you that bag in that
3 bedroom?

4 MR. KAPLAN: Your Honor, he is badgering the
5 witness. He has already given the answer.

6 THE COURT: Sustained.

7 Q Did he hand you that bag in that bedroom and
8 did you say, "This is more like it"?

9 A I don't recall.

10 Q "It feels like an ounce"?

11 A I don't recall. May I refer to my notes?

12 MR. KAPLAN: Your Honor, I object to this
13 line of questioning.

14 THE COURT: No. The line is proper. But the
15 repetition is improper.

16 Q What you are saying then is you don't recall
17 whether or not that happened? Is that what you mean?

18 A I don't recall it happened the way you are
19 mentioning it, yes sir.

20 Q Did you write this:

21 "...Lange went to a small chest and took a
22 plastic bag contained a white powder from the top drawer
23 and handed it to Special Agent Alleva. Special Agent Alleva
24 told Lange that this package felt more like an ounce than
25 the first one..."

Do you remember writing those words, Agent Alleva?

A May I see it?

Yes sir.

Q Well, are they true?

A Yes sir.

Q You mean you now remember that happened because you read your report and it says that?

A I'm sorry?

Q You now remember that fact happening because you read the report and it refreshes your recollection?

A It refreshes my recollection.

Q Tell me, did you read these reports before you testified here on Friday?

A Not all of them, no sir.

Q Did you read the portion with respect to January 6th?

A Yes sir, I did.

Q And did you do that to prepare yourself to testify?

A Yes sir.

Q Did it refresh your recollection as to other events that occurred that day they you testified to?

A I don't understand what you mean, sir.

Q Well, do you remember whether after reading

11

Alleva-cross

1 this as to what the particular party said?

2 A Yes sir.

3 Q Is that what helped you testify on Friday?

4 A It helped refresh my recollection.

5 Q But you now remember being handed that package
6 in the bedroom?

7 A By Lange?

8 Q Yes.

9 A Yes sir.

10 Q Did you put it in your pocket?

11 A I don't remember.

12 Q Did you carry it in your hand out to the car?

13 A I wouldn't do that, no sir.

14 Q Did you give it back to Mr. Lange?

15 A I don't recall.

16 Q How long did you have it in your hand?

17 A Several seconds.

18 Q And what did you do with it after holding it
19 for a few seconds?

20 A I may have put it back in my pocket or I may
21 have given it to Lange, I don't recall.

22 Q But you know you didn't carry it in your hand?

23 A No sir, I did not.

24 Q Do you remember questioning the quality in that
25

1 bedroom? Do you remember telling us about that?

2 A Yes sir.

3 Q Do you remember you said that you questioned
4 the quality and Mr. Kaplan said it was good stuff.
5

6 Did you tell us that on Friday?

7 A No, I didn't tell you that he said it was good
8 stuff. I told you he said, "It was 5 hit stuff."

9 Q Didn't you put in your report that Lange said
10 it was good stuff and not like the last time?

11 A If it says in the report, yes sir I did.

12 Q Did you put it in the report? Is that what
13 happened?

14 A It's possible both -- I am telling you what
15 Mr. Kaplan said.

16 You asked me -- I was asked to testify as to
17 what Mr. Kaplan said.

18 If you are asking me to testify as to what
19 Mr. Lange said then I was told that I cannot testify as to
20 what Mr. Lange said.

21 Q Who told you that?

22 A That would be hearsay. I can't answer.

23 Q Do you mean you didn't testify as to what Lange
24 said on January 6th?

25 A Not his direct statement.

1
2 Q Didn't you tell us that Lange discussed the
3 money with you briefly?

4 A When, sir?

5 Q On Friday?

6 A When did he discuss the money briefly?

7 Q Up in the bedroom.

8 A On the 6th do you mean? Yes sir.

9 Q Didn't you tell us that?

10 A Yes sir.

11 Q When you went outside to the car with Mr. Lange,
12 immediately before that didn't Mr. Kaplan say, "Why don't you
13 two go outside, " or words to that effect?

14 A No sir.

15 Q Nothing like that?

16 A No sir.

17 Q And when he handed you the material, the heroin,
18 did you believe that the sale was consummated at that point
19 or completed in the bedroom?

20 A Yes sir, I believed that at that point I was
21 given the package.

22 Q And you went downstairs with it at that point?

23 A Yes sir.

24 Q Left the house?

25 A Left the house, yes sir.

14

Alleva-cross

Q Did you see anyone outside the house that was inside the house?

A No sir.

Q Did you see Mrs. Lange?

A No sir, I didn't see her.

Q Did you see any other people in the house?

A No, I did not.

Q You went to your vehicle, sir?

A Yes sir.

Q Where was your vehicle?

A It was parked approximately 75 to 100 feet from the house.

Q Where was the money that you were supposed to give to Mr. Lange?

A It was locked in the trunk of the car.

Q Was it your plan to hand him the money before he was arrested?

A Was it my plan? No sir.

Q Did you test the material in the car at that time?

A Yes sir.

Q And then you gave a signal to your fellow agents to make an arrest?

A Yes sir.

15

Alleva-cross

1 Q How long was it from the time you left the
2 house until the time you were arrested?
3

4 A Minutes. Three, four, five. I have no way of
5 approximating.

6 Q Did you see Mr. Kaplan on the street?

7 A Did I see him on the street? No sir.

8 Q As you were being arrested?

9 A No sir.

10 Q Do you know whether he was arrested at the same
11 time you were?

12 A He wasn't arrested at the same time. I would
13 say minutes later.

14 (continued on next page)

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2 A (Continuing) As he tried to exit the house he
3 was arrested.

4 Q You know that?

5 A Yes.

6 Q You saw it?

7 A No sir, I didn't see the entire thing.

8 Q Did you see where Mr. Kaplan was arrested?

9 A No sir.

10 Q Well, then you don't know when he was arrested
11 then or where? Is that right?

12 A Not from my own knowledge, I don't know, but
13 what I was told.

14 Q You said you put a package into the console of
15 the car.

16 What does that mean? The glove compartment?

17 A No sir, the space between the two buckets.

18 Q How long did it take you to test this material?

19 A Minutes. A minute. I have no idea.

20 Q Can you tell us what you did to test it?

21 A Yes sir. There was a field test that we used
22 to determine whether or not there is narcotic drugs present
23 in the powder. And I took a small portion of the powder,
24 placed the chemical on it. The right thing happened and --

25 (Mr. La Rossa confers with defendant.)

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Q Are you finished?

A No. I was waiting for you.

The right thing happened. I assumed there was narcotic drugs present in the white powder.

Q That is when you gave the signal?

A No sir -- well, yes sir, I am sorry.

Q Tell me something, did you ever see Mr. Kaplan touch that package?

A Did I ever see him touch it? No sir.

Q Am I correct in assuming that once you got your hands on that package you had it completely tested by a laboratory?

A Once I got my hands on it?

Q You mean the agents?

A Oh, yes sir.

Q And you determined whether or not MR. Kaplan's fingerprints were on that package?

A No sir, we didn't.

Q You didn't try to find out whether he touched it?

A No sir, we did not.

Q You didn't think that was important?

A Well, we didn't think it was feasible.

Q Did you try?

A No sir.

Q Are you an expert on fingerprints?

A It is not the standard procedure to test every package for fingerprints.

Q But this was the package involved in this particular case, wasn't it?

A Yes sir.

Q Did you have an expert look at it to see if Mr. Kaplan's fingerprints were on it?

A No sir.

MR. LA ROSSA: I have no further questions.

THE COURT: Any redirect?

MR. KAPLAN: Yes sir.

REDIRECT EXAMINATION

BY MR. KAPLAN:

Q Agent Alleva, how many times did you testify before the Grand Jury with respect to this case?

A Twice.

Q Do you happen to recall the two days that you testified?

A No sir, I do not.

Q I am going to show you what has been marked the Government's Exhibits 2 and 3 for identification and ask you if that refreshes your recollection as to when you testified before the Grand Jury on both occasions.

1
2 A Yes sir.

3 Q When did you testify?

4 A The first time was January 11th. And the
5 second time was July 11th.

6 Q Do you happen to recall testifying on each
7 occasion?

8 A Yes sir.

9 Q Do you happen to recall that there was an
10 Assistant United States Attorney directing the questions to
11 you on each occasion?

12 A Yes sir, there was.

13 Q With respect to the first time who was the
14 Assistant United States Attorney?

15 A Harold J. Friedman.

16 Q Who was the Assistant United States Attorney
17 on the second occasion?

18 A Yourself, Kenneth J. Kaplan.

19 Q Now, can you tell us if you recall on the first
20 occasion whether you were asked certain questions about the
21 acts in this case?

22 A Yes sir.

23 Q Now, can you tell us whether you were supplied
24 a date by the Assistant United States Attorney?

25 A Yes, I was.

Q Mr. Friedman?

A Yes sir, I was.

Q Did he supply you with the date?

A Yes sir, he did.

Q What date did he supply?

A December 3, 1971.

MR. LA ROSSA: I object to the form of the question and to move that it be stricken.

THE COURT: Well, it is a little late now.

Q Does it refresh your recollection as to what date was supplied?

A Yes sir, it does.

Q Can you tell us at any time during the Grand Jury testimony did you give the date?

A No sir, I don't believe I did.

MR. LA ROSSA: I object to this. I object to the form of the question. It is improper.

THE COURT: No, I think in view of the cross-examination I will permit it.

MR. LA ROSSA: I object to the words "Supply a date."

The man answered questions, your Honor. He wasn't supplied with the dates.

MR. KAPLAN: I will rephrase it your Honor.

THE COURT: Go ahead.

Q At any time did you give the date --

A No sir.

MR. LA ROSSA: Objection.

Q (Continuing) -- in your answers in response to Mr. Friedman's questions?

A No sir, I didn't give the date.

Q Now, the second occasion that you testified before the Grand Jury were you also asked questions?

A Yes sir, I was.

Q At that time in the questions of the Assistant United States Attorney was it data stated or asked?

MR. LA ROSSA: Objection to the form of the question.

THE COURT: The form?

MR. LA ROSSA: Yes.

THE COURT: I don't understand what the objection is as to form.

MR. LA ROSSA: Because it is an improper in referring to the Grand Jury minutes. That the man was asked a question and gave an answer. I think it can be elicited in that manner and not who supplied a date, your Honor. The man was asked a question. There are no statements in there.

The man is being asked the question, were you supplied a date at that time. It's an improper question. With reference to the Grand Jury minutes, your Honor, he answered a question that was propounded to him.

THE COURT: All right, rephrase it.

Q Do you happen to recall if the Grand Jury minutes will refresh your recollection as to what happened in the Grand Jury on that particular occasion?

A Yes sir.

Q Tell us what happened on that particular occasion?

A Yes. I was asked certain questions by the United States Attorney and I answered those questions. And in those questions the United States Attorney supplied -- part of the question was a date in the year 1971, December.

Q That was on the first occasion?

A Yes, the first occasion, yes sir.

Q That is when Mr. Friedman was asking you questions?

A Yes.

Q That was December 3rd he supplied you, is that correct?

A Yes.

Q What happened on the second occasion?

A On the second occasion, realizing that --
MR. LA ROSSA: I object to this.

THE COURT: Yes, that "realizing" will be
stricken.

A (continuing) On the second occasion when I was
questioned in the Grand Jury the date January 6th was used.

Q Is that the correct date?

A Yes sir, the correct date.

Q By the way, the first occasion in the Grand Jury
was January 11th, 1972?

A Yes.

Q That was five days after the date that you
testified to as the meeting took place between Kaplan, Lange
and yourself?

A Yes sir.

Q By the way, when did you make out your report
with respect to this case? What date was that?

A I would have to look at the date on there.

Q I show you what has been marked as Government's
Exhibit 1 marked for identification.

A January 7th, 1972.

Q That was a date subsequent to the meeting?

A To the meeting, yes sir.

Q And in your report is it indicated, the actual

date of the meeting?

A Yes sir.

Q And what date is that?

A January 6th.

Q So there is no doubt in your mind it was January 6th, 1972 and no other possible date?

A No sir, no other possible date.

Q Can you tell us what term might be employed when we are talking about the dilution of narcotics? What is the common term?

A For narcotics? Stuff, merchandise.

Q With respect to the dilution of narcotics, when you used the term here today and Friday, hit?

A I am sorry, I didn't hear what you said. Diluting narcotics would be to hit, step on, smack, whack.

Q Can you tell us whether the term hit, is that a very common expression?

A That is probably the most common.

Q Would it be common if anybody you are dealing in narcotics with would be using this particular term?

MR. LA ROSSA: Objection.

THE COURT: It has been sufficiently answered. Sustained.

Q After you took the narcotics from the car at

that time from Mr. Lange, was it --

A Well --

Q -- you tested the narcotics?

A Yes sir.

Q At that point can you tell us what you did?

A Technically that is not what we would call a purchase. There would be no purchase of narcotics at that point. It was an arrest and seizure. So that when you say purchase, it is nebulous at that point.

Q Well, would you say the narcotics were distributed to you on two occasions?

A Yes.

Q First up in the room and down in the car on the second occasion.

MR. LA ROSSA: I object to this.

THE COURT: Sustained.

Q Will you explain to us --

MR. LA ROSSA: I object.

MR. KAPLAN: We withdraw the question.

Q Can you explain to us when the narcotics were distributed?

MR. LA ROSSA: Objection.

THE COURT: Sustained.

Q When did you receive it from Mr. Lange?

1
2 A From Mr. Lange? I received it when he handed
3 me the package upstairs in the bedroom and I weighed it --
4 not weighed it but I tested it with my hand. And again the
5 reason that I said these things with a view to prior episodes
6 prior to this --

7 MR. LA ROSSA: I object and move that this be
8 stricken.

9 THE COURT: Yes.

10 MR. KAPLAN: I have no further questions.

11 **RECROSS-EXAMINATION**

12 BY MR. LA ROSSA:

13 Q There is no question in your mind that on
14 January 11th you went before a Grand Jury and were asked
15 about the facts you testified to here on Friday and today,
16 and you stated that occurred on the third day of December?

17 A I did not state that it occurred on the third
18 day of December.

19 Q Were you asked whether you saw Mr. Kaplan
20 on December 3rd, 1971?

21 A Yes sir.

22 Q Did you say yes.

23 A I cannot answer that question for the simple
24 reason that I don't know whether or not the question was
25 asked me December 3rd, or if that December 3rd was placed in

1
2 by the stenographer. I cannot answer that question. I will
3 not answer. --

4 Q Were you asked this question and did you give
5 this answer:

6 "Q I would like to direct your attention to
7 December 3rd, 1971. On that date did you visit the residence
8 of Frank Lange to again purchase heroin?

9 "A Yes."

10 Did you give that answer to that question on
11 January 11th, 1972 before the Grand Jury under oath?

12 A Sir --

13 Q Yes or no?

14 A I'm telling you I don't know if the question
15 was asked with December 3rd or if the December 3rd was put
16 in as typographical error upon the Court Stenographer trans-
17 ferring the transcript. I don't know.

18 If you are asking me if that is what the
19 Grand Jury minutes read, I will answer yes. My answer was
20 yes. So I cannot tell you if the question was asked with
21 December 3rd or if December 3rd was put in afterward.

22 MR. LA ROSSA: May we stipulate the accuracy
23 of the Grand Jury minutes as presented to me by the
24 Government?

25 MR. KAPLAN: I will so stipulate.

1
2 Q We are stipulating that that question that was
3 asked of you, sir, says December 3rd.

4 Now did you give that answer to that question?

5 A If the stipulation is accepted, yes sir, I did.

6 Q And were you then asked who was present if
7 anyone with Lange at that time when you went there?

8 "A There was an individual known as Sammy
9 Kaplan present in the room and Frank Lange."

10 You see that question?

11 A Yes sir.

12 Q Just a few days after this occurred?

13 A Yes sir.

14 Q Five days later?

15 A Yes.

16 Q And you had your report prepared?

17 A Yes sir.

18 MR. LA ROSSA: I have nothing further.

19 RE-REDIRECT EXAMINATION

20 BY MR. KAPLAN:

21 Q Do you recall on that occasion having heard
22 the date when you were asked the question of December 3rd?

23 A No sir, I don't.

24 Q Do you recall having heard any date?

25 A No sir.

MR. KAPLAN: I have no further questions.

THE COURT: Thank you, step down.

(Witness excused.)

THE COURT: Next witness.

MR. KAPLAN: The Government would call Larry

Burstein.

L A R R Y B U R S T E I N, called as a witness having been
first duly sworn by the Clerk of the Court
testified as follows:

THE CLERK: What is your full name?

THE WITNESS: Larry B-u-r-s-t-e-i-n.

DIRECT EXAMINATION

BY MR. KAPLAN:

Q Sir, what is the nature of your employment?

A I am a Special Agent for the Drug Enforcement
Administration.

Q And that was known as the Bureau of Narcotics
and Dangerous Drugs?

A Yes, it was.

Q Were you so employed on January 6th, 1972?

A Yes, I was.

Q And in what specific capacity?

A Well, I was assigned to participate in a
surveillance and subsequent arrest on that date.

United States v. Samuel A. Buntin, Jr.

LADIES AND GENTLEMEN OF THE JURY:

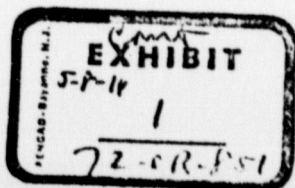
It is my function now to instruct you with respect to matters of law. It is your duty as jurors to follow these instructions. It is your exclusive function to determine the facts in this case, You are the sole judge of the facts--not counsel or I.

If, during the course of the trial a question was asked and an objection interposed which the Court sustained, you are to disregard the question. And, if an answer was stricken, you are to disregard the matter that was stricken from the record. My rulings on evidence or any other rulings I have made do not reflect the Court's view of the guilt or innocence of the defendant, but are matters of procedure about which you should have no concern.

The fact that the prosecution is brought in the name of the United States of America does not entitle the government to any greater consideration than any other litigant. All parties--government and individuals--are equal before this court. None is entitled to sympathy or favor.

Before discussing the particular charges in this case, there are some general principles which you should bear in mind.

An indictment is an accusation in writing. It is no evidence of guilt, and is entitled to no weight at all in your consideration.



The defendant has pleaded not guilty.

The government has the burden of proving guilt beyond a reasonable doubt with respect to every element of each crime. A defendant does not have to prove his innocence. A defendant need not submit any evidence at all. On the contrary, he is presumed to be innocent. The fact that a defendant does not testify creates no inference against him. He has a constitutional right not to testify.

The burden of proof beyond a reasonable doubt lies with the government and continues throughout the trial.

A reasonable doubt means a doubt sufficient to cause a prudent person to hesitate to act in the most important affairs of his life.

Finding a citizen to be guilty of a crime and subjecting him to criminal penalties is serious and you will consider this fact in deciding whether you have a reasonable doubt. Nevertheless, if you are convinced beyond a reasonable doubt of the defendant's guilt you should find him guilty and not be swayed by sympathy.

The law does not require certainty because only those present at an event can feel certain about what happened and even they can be wrong.

In this case, the defendant, Mr. Samuel Kaplan is charged with two separate counts or charges. I shall read you the indictment and then I will explain each of these counts to you separately. The indictment reads as follows:

On or about the 6th day of January 1972, within the Eastern District of New York, the defendant SAMUEL KAPLAN, did possess, with intent to distribute, approximately 25.6 grams of heroin, a Schedule I narcotic drug controlled substance.

(Title 21, United States Code, §841(a)(1)
Title 18, United States Code, §2)

COUNT TWO

On or about the 6th day of January 1972, within the Eastern District of New York, the defendant, SAMUEL KAPLAN, knowingly and intentionally did distribute approximately 25.6 grams of heroin, a Schedule I narcotic drug controlled substance.

(Title 21, United States Code, §841(a)(1) and
Title 18, United States Code, §2)

Before I explain each of these counts to you in detail, let me speak to you a moment about the words "intentionally" and "knowingly" because each of the charges requires that both of these elements be present. I will have more to say later on about these concepts, but let me note preliminarily--

A person does not knowingly do an act if his action resulted from a mistake, negligence of any other innocent reason.

An act is intentional if the defendant acts voluntarily and with the specific intent to do something the law forbids--that is to say, with the bad purpose either to disobey or to disregard the law.

The state of mind of the defendant will have to be inferred from the circumstances as revealed from the evidence in the case.

Let us now discuss the elements of each of the individual counts.

Count one is what I shall call the "possession count."
I shall refer to Count two as the "distribution count."

Count one, the "possession" count, charges that Mr. Kaplan knowingly and intentionally possessed with intent to distribute approximately 25.6 grams of heroin in violation of title 21, United States Code, §841(a)(1). Section 841(a)(1) provides in pertinent part:

(a) . . . it shall be unlawful for any person knowingly or intentionally--

(1) . . . to distribute or [to] possess with intent to distribute a controlled substance;

Heroin is a controlled substance within the meaning of this statute.

To find Mr. Kaplan guilty of Count one you must find that the government has proved each of three essential elements beyond a reasonable doubt:

First, the defendant did in fact possess the heroin.

The word "possession" as I have used it in defining this crime does not mean only actual physical possession of the Heroin. It also means dominion and control of the drugs such that the defendant could move them himself or cause others to use them as his agents.

This is what is known as constructive possession.

For example, some of you may have worn gloves or scarves on the way to the Courthouse today and put them in the pocket of your coat when you hung it up. Those gloves are in your possession even though you do not have them right here in your hands.

It would not even matter that someone else had put the gloves in your coat pocket with your consent to put them there. As long as you knew they were there and could go and get them, or have someone else go and get them, they would be in your possession as far as the law is concerned.

In short, it is not necessary for the Government to prove that the defendant had actual physical possession of the heroin mentioned in the indictment. Proof of constructive possession is sufficient.

Second, that the defendant did so knowingly and intentionally that is to say, that he knew it was heroin.

Third, if you find that the defendant did in fact possess the heroin you must also find beyond a reasonable doubt that he did so with intent to "distribute" the cocaine. "Distribute" has a simple meaning as used in this law. It means to deliver, that is to transfer. It is enough if he intended to hand over the heroin to anyone or to have someone else hand it over.

Count One also charges Mr. Kaplan with violating section 2 of title 18 of the United States Code. Section 2 of title 18 reads, in pertinent part:

Whoever aids, abets, counsels, commands, induces or procures

the commission of an offense against the United States is guilty of that crime as if he committed it himself.

In other words, Mr. Kaplan is accused of aiding, abetting, counseling, commanding, inducing or procuring the violation of section 841 which I read to you before--knowingly possessing with intent to distribute a controlled substance. In order to aid or abet another to commit a crime it is necessary to find that the defendant, Samuel Kaplan, wilfully associated himself in some way with the criminal venture, and wilfully participated in it as he would in something he wishes to bring about.

Thus to find Samuel Kaplan guilty of Count One as an aider or abettor, you must find the government has shown two things beyond a reasonable doubt. First, that Mr. Lange knowingly and

intentionally possessed with intent to distribute the heroin-- as I have explained this concept to you earlier. And, secondly, that Samuel Kaplan wilfully aided, abetted, counseled, commanded, induced, or procured Mr. Lange to commit this crime. An act is done wilfully if done voluntarily and intentionally, with the specific intent to do something the law forbids.

To summarize, you may find Mr. Kaplan guilty of Count One if you find that he himself knowingly and intentionally possessed the heroin with intent to distribute it or that he aided, abetted, counseled, commanded, induced or procured Mr. Lange to do so.

Count two, the "distribution" count, charges that Mr. Kaplan knowingly and intentionally distributed approximately 25.6 grams of heroin in violation of title 21 of the United States Code, section 841(a)(1). I have read you this law in connection with Count One.

To find Mr. Kaplan guilty of Count Two you must find that the government has proved each of two essential elements beyond a reasonable doubt:

First, that the defendant did in fact distribute the heroin. I have already explained to you that distribute means to deliver or to transfer to anyone else.

Second, that the defendant did so knowingly and intentionally that is to say that he knew it was heroin he was distributing.

Count Two also charges Mr. Kaplan with violating section 2 of title 18 of the United States Code. As I explained to you in connection with Count One this statute provides that

Whoever aids, abets, counsels, commands, induces
or procures

the commission of an offense against the United States is guilty
of that crime as if he committed it himself.

In other words in this part of Count Two Mr. Kaplan is
accused of aiding, abetting, counseling, commanding, inducing
or procuring Mr. Lange to distribute heroin. Thus to find Samuel
Kaplan guilty of Count Two as an aider or abettor you must find
that the government has shown two things beyond a reasonable
doubt. First, that Mr. Lange knowingly and intentionally distributed
heroin. And, secondly, that Samuel Kaplan wilfully aided, abetted,
counseled, commanded, induced or procured Mr. Lange to commit this
crime.

A critical issue for you in this case will be that of
knowledge. The fact of knowledge may be established by direct or
circumstantial evidence just as any other fact in this case.
Knowledge may be proven by the defendant's conduct since we have
no way of looking into a person's mind directly. [The defendant
has testified that he had no such knowledge.] One may not
wilfully and intentionally remain ignorant of a fact important and
material to his conduct in order to escape the consequences of
the criminal law.

In other words you may find defendant acted knowingly if
you find either that he actually knew it was heroin that he possessed
or distributed or aided to be possessed or distributed--or that he

deliberately closed his eyes to what he had every reason to believe was the fact. But I would like to emphasize, ladies and gentlemen, the requisite knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of the defendant.

United States v. Jacobs, 475 F. 2d 270 (2d Cir. 1973);
United States v. Brawer et al., ~~Cal. Nos. 612-614~~, 492 F.2d 117
(2d Cir. June 1973)

In determining whether the prosecution has proved its case beyond a reasonable doubt, you must determine the credibility of the witnesses before you and weigh their testimony. In weighing testimony, you may consider the relationship of the witness to the government; the witnesses' bias or interest in the outcome of the case; his manner while testifying; his candor and intelligence, as you have observed it; the extent to which he has been corroborated or contradicted by other credible evidence; inconsistencies within his own testimony; whether he has been previously convicted of a crime and whether he has changed his testimony.

If you believe that a witness has wilfully sworn falsely before you with respect to a material element of the case, you may disregard his testimony in whole, or in part. But, a witness may have been mistaken or may have lied with respect to part of his or her testimony, and be accurate with respect to other parts.

You are entitled to your own opinions but you should exchange views with your fellow-jurors and listen carefully to each other. While you should not hesitate to change your opinion if you are convinced that another opinion is correct, your decision must be your own.

Any verdict you reach must be unanimous.

Your oath sums up your duty--and that is, without fear or favor to any one, you will well and truly try the issues before these parties according to the evidence given to you in court and the laws of the United States.

[The attorneys will come to the side bar to make any exceptions.]

[Excuse alternates]

[Swear Marshals]

You may now retire to the jury room.

3 THE CHARGE OF THE COURT

4 Weinstein, J.

5
6 Ladies and gentlemen, I am going to tell you
7 what the law is. I want you to apply it. You will
8 decide the facts. Neither the attorneys nor I have
9 anything to do with that function. I have no view
10 of the guilt or the innocence of this defendant.
11 It's solely a matter for you to decide.

12 There were a number of instances in which
13 I ordered some matter stricken from the record. You
14 will ignore that information. It is not before you.

15 The fact that this is entitled a case by
16 the United States does not mean that the Government
17 should get any greater sympathy than the individual.
18 All parties are equal in this court.

19 This is an indictment. As I have indicated
20 to you, an indictment is merely a way of bringing
21 a case into court. It is not any evidence at all
22 of guilt. You will decide guilt or innocence
23 solely on the evidence that you saw here in open
24 court.

25 The Government has the burden of proving

Charge

guilt beyond a reasonable doubt with respect to each element of the two offenses the defendant is charged with committing. The defendant doesn't have to prove his innocence. He doesn't have to introduce any evidence. He doesn't have to take the witness stand. The burden of proof beyond a reasonable doubt lies with the Government right through the trial.

Reasonable doubt means a doubt sufficient to cause a prudent person to hesitate to act in the most important affairs of his life. You will appreciate that the possibility of finding a defendant guilty of a felony is an extremely important event in his life, and therefore in yours. Nevertheless, if you are convinced beyond a reasonable doubt of the defendant's guilt, you should find him guilty and not be swayed by sympathy.

The law does not require certainty, because only those who were there can feel certain, and even they may be mistaken, since in a case like this we have to infer what was in the mind of the defendant.

Here the defendant is charged with two counts or crimes, and I will read the charge to you.

Charge

First, on or about the 6th day of January 1972, within the Eastern District of New York, the defendant Samuel Kaplan did possess with intent to distribute approximately 25 grams of heroin, a Schedule I narcotic drug controlled substance.

Count 2. On or about the 6th day of January 1972 the defendant Samuel Kaplan knowingly and intentionally did distribute approximately 25 grams of heroin.

The words "intentionally" and "knowingly" are important in this case. A person does not knowingly do an act if his action resulted from a mistake, neglect, or any other innocent reason. An act is intentional if the defendant acts voluntarily and with the specific intent to do something the law forbids, that is to say, with a bad purpose either to disobey or to disregard the law. As I say, what the state of mind of this defendant was is something that you're going to have to decide from the evidence.

Count 1 is what we will call the possession count. It charges a violation of Section 841(a) of the United States Code, Title 18, which reads:

Charge

"...it shall be unlawful for any person knowingly or intentionally...to possess with intent to distribute a controlled substance."

Heroin is a controlled substance. So, to find Mr. Kaplan guilty beyond a reasonable doubt, you must find three elements beyond a reasonable doubt:

First, that he did in fact possess heroin. The word "possess" as I use it and as the statute uses it does not mean actual physical possession in the sense that he actually had it in his hand. It also means dominion and control over the drug, such as the defendant might have if he could cause others to move it. This is what we call constructive possession. For example, some of you may have worn gloves or a scarf into court, and those garments may still be in your coat hanging in the jury room. These gloves are still in your possession, even though you don't have them in your hand, and it wouldn't make any difference if somebody else had put them in your pocket, if you knew he was putting them in your pocket, and if you had given your consent for him to do so. So you don't have to actually have physical possession.

Charge

Proof of constructive possession is sufficient.

Second, the defendant must knowingly and intentionally have possession. That is, he must have known that this was heroin.

Third, you must find beyond a reasonable doubt that he possessed it with intention to distribute it. "Distribute" has a very simple meaning in the law. It means to hand it over or transfer, whether for money or not.

Count 1 also charges the defendant with aiding and abetting. The statute says that "whoever aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States is guilty as if he were the principal himself. He is accused of aiding, abetting, counseling, commanding, inducing or procuring the violation of the section I have just read to you, knowingly, with possession or intent to distribute a controlled substance.

In order to find aiding or abetting, it is necessary to find that the defendant willfully associated himself in some way with this criminal venture and that he willfully participated in it as he would something he wished to bring about.

Charge

1
2 You have to find two things to find him
3 guilty as an aider and abettor. First, that he
4 knowingly and intentionally possessed. That is,
5 Mr. Lange knowingly and intentionally possessed
6 with intent to distribute the heroin as I have
7 explained that to you earlier. Second, that this
8 defendant, Mr. Kaplan, aided, abetted, counseled,
9 commanded or induced or procured Mr. Lange to
10 commit this crime and that he did it willfully.

11 As I have already told you, an act is
12 done willfully if it is done voluntarily and
13 intentionally and with the specific intent to
14 do something the law forbids.

15 If you want to find out whether the defend-
16 ant aided and abetted, you must ask yourself such
17 questions as, "Did he associate himself with the
18 venture? Did he participate in it as something
19 he wished to bring about? Did he seek by his
20 actions to make it succeed?" If he did, then he
21 is an aider and abettor.

22 The mere presence at the scene of a crime,
23 even coupled with knowledge that a crime is taking
24 place, is insufficient to sustain a conviction for
25 aiding and abetting. You may find that presence

Charge

coupled with other evidence could show that a defendant is aiding and abetting.

To summarize, then, you may find the defendant guilty of Count 1 if you find that he himself knowingly and intentionally possessed the heroin with intent to distribute it, or that he aided, abetted, counseled, commanded, induced or procured Mr. Lange to do so.

The second count is the distribution count. It charges that this defendant knowingly and intentionally distributed this very same heroin, and in order to find him guilty you must find two elements beyond a reasonable doubt: First, that the defendant did distribute heroin, directly or indirectly -- and providing for a transfer is sufficient. Second, that he did so knowingly and intentionally, that is to say, that he knew there was heroin in this package. In this count as well as in the first, aiding and abetting is charged; so that if the defendant aided and abetted Mr. Lange in distributing, that would be sufficient. So to find Mr. Kaplan guilty of Count 2, you must find that the Government has shown, first, that Mr. Lange knowingly and

Charge

intentionally distributed, and secondly, that he willfully aided and abetted, counseled, commanded, induced or procured Mr. Lange to commit this crime or, alternatively, that he himself distributed, using Mr. Lange as his agent.

A critical issue in this case is knowledge. Did the defendant know that Lange had this narcotic when he went into the room? Did he know it was going to be distributed to this agent? The fact is that knowledge may be shown by direct or circumstantial evidence, just as any other fact in the case, and we have to determine that by what people do or say, because we can't look into their brains.

This defendant has testified that he had no such knowledge. The Government contends that his actions showed that he did have such knowledge.

One may not willfully and intentionally remain ignorant of a fact important and material to his conduct in order to escape the consequences of the criminal law. So if you find that the defendant acted knowingly, you may base that finding on the fact that he either actually knew it

Charge

1
2 was heroin or that he deliberately closed his
3 eyes to what he had every reason to believe was
4 the fact. That's only with respect to knowledge.
5 You still have to find all the other elements
6 I have explained to you.

7 Mere neglect or even foolishness is not
8 sufficient to find a defendant guilty. Obviously,
9 in this case an important matter for you to de-
10 termine is credibility. Which witnesses were
11 telling the truth? Which lied, and in which
12 respect? There was a clear conflict here between
13 the defendant's testimony and the agent's testimony
14 with respect to what the defendant did and said
15 in that room.

16 In weighing testimony you may consider the
17 relationship of the witness to the Government or
18 to the defendant, his bias or interest in the out-
19 come of the case, that is, what he has to gain
20 or lose in the case, his manner or her manner
21 while he or she was testifying, his candor, his
22 intelligence as you observed it, the extent to
23 which there has been corroboration in the evidence,
24 inconsistencies within the testimony, and so on.

25 If you believe a witness has sworn falsely

Charge

1
2 to you, you're entitled to disregard entirely
3 his testimony, but you don't have to, because
4 a witness may be telling the truth in part and may
5 be lying in part, or may be inadvertently mis-
6 taken in part and telling the truth in other
7 critical parts of what he says or she says.

8 Each is entitled to your own opinion in
9 that jury room. You should exchange views with
10 each other, listen carefully and politely to each
11 other. If you think you're wrong, you should
12 change your opinion. If you do not think you're
13 wrong, it's your decision as an individual that
14 counts. Remember, however, that all of you must
15 agree if we are to have a final verdict in this
16 case. That is, there must be a unanimous verdict.

17 Now, if there is no objection, I'd like to
18 excuse the two alternates. Thank you very much,
19 gentlemen. We won't need you. You may be released.

20 (Two alternates excused.)

21 THE COURT: You'd better report downstairs.
22 Don't discuss this case with anyone, gentlemen,
23 until the verdict is in.

24 Gentlemen, would you come to side bar in
25 case I have misspoken.

Charge

(The following occurred at side bar.)

MR. LA ROSSA: No exceptions to the charge.

MR. KAPLAN: No exceptions.

(The following took place in open court.)

THE COURT: Swear the marshal, please.

(Samuel Armstrong is sworn.)

THE COURT: Give the foreman some pencils
and paper.

THE CLERK: Yes, your Honor.

THE COURT: You may retire and consider
your verdict, ladies and gentlemen.

(The jury leaves the courtroom.)

THE COURT: Is 72-CR-31 open?

MR. KAPLAN: Yes.

THE COURT: I will entertain a motion
to dismiss.

MR. LA ROSSA: Move to dismiss.

MR. KAPLAN: I'll join in that motion.

THE COURT: 72-CR-31 is dismissed.

(Time noted: 3:35 p.m.)

(Continued on the following page.)

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK
4 -----X

5 UNITED STATES OF AMERICA, :

6 -against- :

72CR851

7 SAMUEL KAPLAN, :

8 Defendant. :

9 -----X

10
11
12 United States Courthouse
13 Brooklyn, New York

14
15 May 8, 1974
16 9:30 o'clock a.m.

17 B e f o r e :

18 HONORABLE JACK B. WEINSTEIN, U.S.D.J.
19

20
21
22 SHELDON SILVERMAN
23 ACTING OFFICIAL COURT REPORTER
24
25

Appearances:

EDWARD J. BOYD, ESQ.
United States Attorney
for the Eastern District of New York

BY: KENNETH KAPLAN, ESQ.
Assistant United States Attorney

JAMES LA ROSSA, ESQ.
Attorney for Samuel Kaplan

1 MR. LA ROSSA: I am here basically to bring
2 something to your attention because I think that you
3 should correct it in the interest of justice.

4 As your Honor is aware, and I would like very
5 much to mark this and make it part of the record in the
6 proceeding that was tried before your Honor. I don't
7 know that a copy was marked. This is the copy of the
8 charge that your Honor gave to us.

9 THE COURT: Mark this as an exhibit at this
10 hearing.

11 THE CLERK: Court Exhibit 1.

12 THE COURT: What is this, a motion for a new
13 trial?

14 MR. LA ROSSA: Yes.

15 THE COURT: Proceed.

16
17 (Continued next page)
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21
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25

1 MR. LA ROSSA: Would you make this exhibit part
2 of the original proceeding before your Honor? It's
3 going to become important.

4 THE COURT: I believe it is. I always mark the
5 proposed charge.

6 MR. LA ROSSA: If that's been marked, I have no
7 problem.

8 THE COURT: I'm almost certain it was.

9 MR. LA ROSSA: Your Honor, we'll note that you
10 distributed this to us prior to the time that you gave
11 the charge to the jury. Necessarily, we then brought
12 to your Honor's attention whether we thought there were
13 mistakes in the charge or changes that we wished to
14 make. I did bring some requests to your Honor that you
15 did agree to change.

16 THE COURT: This was Court Exhibit 5 at the trial.

17 MR. LA ROSSA: However, in reading it, your Honor,
18 you eliminated the portion of the charge with respect
19 to presumption of innocence.

20 THE COURT: No, I did not.

21 MR. LA ROSSA: I am afraid you did. Not only
22 does the record show that, but I went to the Court
23 Reporters and asked them to read back the notes again.
24 I have the record here and again --

25 THE COURT: May I see it?

1 MR. LA ROSSA: Yes, this is the paragraph in
2 your Honor's charge.

3 THE COURT: The record will show I gave a
4 preliminary charge on the voir dire instructing the
5 jury on presumption of innocence and I do not believe
6 that I omitted this. I don't care what the reporter
7 says, what is in his notes.

8 MR. LA ROSSA: I asked him to recheck the notes.

9 Is that you?

10 THE REPORTER: Yes.

11 MR. LA ROSSA: He read word-for-word to me over
12 the phone. I checked the transcript along with the
13 words that were read to me and the presumption of
14 innocence was eliminated. I think it's even more
15 important that your Honor gave a preliminary instruc-
16 tion at the beginning of the trial with respect to
17 presumption of innocence because it almost is an
18 indication then at the end of the trial that there is
19 no presumption of innocence whereas it becomes
20 extremely important at that point when the jury
21 begins the deliberations that they're to assume that
22 the defendant is presumed innocent until they overcome
23 their burden.

24 THE COURT: My recollection and, of course, I
25 can't remember what words I said, is that I have

1 never omitted in any charge I've given in a criminal
2 case, to tell the jury about the presumption of
3 innocence. It's on my mind constantly. It was told
4 to the jury at least once on the voir dire and probably
5 a number of times. It was told to them repeatedly
6 during the opening. It was told to them during the
7 closing by you, appropriately, and perhaps by Mr. Kaplan,
8 although I don't remember it.

9 I read this, the charge, with some slight
10 changes, but I had this very document before me. Counsel
11 had the document before them. I assume that they were
12 doing what they always do in these cases and what
13 counsel should do, and that is to follow the charge.
14 I believe Mr. Kaplan was doing that and it was my
15 assumption that you were doing it.

16 You were sitting here at the table with this in
17 front of you. If you thought that there was any
18 omission you should have brought it to my attention
19 immediately. I do not believe there was omission.

20 MR. LA ROSSA: May it please the Court --

21 THE COURT: I obviously can't swear that I said
22 these words.

23 MR. LA ROSSA: May it please the Court --

24 THE COURT: Do you actually remember my not
25 saying the words?

1 MR. LA ROSSA: Absolutely not. I'd be kidding
2 if I said that as well as you saying you remember.

3 MR. KENNETH KAPLAN: Sir, certainly not. I do
4 not remember any omission.

5 THE COURT: Did you follow the charge?

6 MR. KENNETH KAPLAN: I was, as I recall, at
7 this time. There were no exceptions taken at any time.

8 THE COURT: I know that.

9 MR. KENNETH KAPLAN: May I be heard on this
10 point?

11 THE COURT: Yes.

12 MR. KENNETH KAPLAN: The only statement which
13 Mr. LaRossa referred to omitted was on the contrary;
14 the defendant is presumed innocent, one little sentence.
15 In the charge, your Honor referred to the presumption
16 of innocence although not using those exact words.

17 The question arises, whether the words
18 "presumption of innocence" is some magic words that
19 have to be said and --

20 THE COURT: There are cases that say that.

21 MR. KENNETH KAPLAN: I'm prepared on the case
22 law with respect to this. I would cite some cases
23 that the presumption of innocence, the words them-
24 selves, do not have to be stated --

25 THE COURT: The cases go both ways on it.

1 I always say the words because I think they're useful
2 to the jury even though logically they don't make much
3 sense, but as I say, I believe that I read this exactly.

4 MR. LA ROSSA: No, sir, you didn't. If you read
5 your charge, you started to paraphrase.

6 THE COURT: It may be.

7 MR. LA ROSSA: Right at that point. If you
8 examine the charge and you examine the proposed charge,
9 you may see you paraphrased.

10 THE COURT: I have slipped at times. On one
11 occasion I think I said the defendant is presumed to
12 be guilty in my preliminary. We all make mistakes,
13 including counsel.

14 I don't deny this is the situation, but I
15 can't grant the motion on this ground. I do everything
16 possible to avoid this kind of mistake and I have to
17 rely upon counsel to follow and to pick these things
18 up. I believe the charge was fair.

19 That wasn't the problem here. The problem was
20 the credibility problem, whether they believed
21 Mr. Kaplan or not. They didn't believe him. There
22 was no technical problem with the charge. I could
23 have given this charge in three minutes and it would
24 have been a better charge.

25 All I had to do was tell them if they had any

1 doubt about the credibility of the defendant, they
2 should acquit. That was what it all came down to.

3 MR. LA ROSSA: Let me say this. We were going
4 forward to the appellate court on this. You're remarks
5 on the record pose a problem for me. I submit to the
6 Court, most respectfully, that the court reporter's
7 rendition of what was said in the charge has to be
8 considered by this Court to be exactly what your
9 Honor said unless someone can move to change it and we
10 can have an examination and hearing on the court
11 reporter's words, but I must accept them as being the
12 correct words.

13 THE COURT: The record is clear. That's what
14 the reporter has. That's what my charge from which I
15 spoke has. I don't have any direct recollection.
16 Nobody else has a direct recollection and so far as
17 I can recall, I've never slipped on this, but it's not
18 inconceivable that I did. You have your record.

19 MR. LA ROSSA: Thank you.

20 THE COURT: Thank you very much. Good luck.

21 * * *

JUDGMENT AND COMMITMENT
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
)
)
)
)
)
)
SAMUEL KAPLAN)

No. 72 CR 851

On this 26th day of April, 1974 came the attorney for the government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant upon a verdict of guilty has been convicted of the offense of violating T-21, U.S.C., Secs. 841(a)(1) and T-18, U.S.C., Sec. 2, in that on or about Jan. 6, 1972, the defendant, did possess and did knowingly and intentionally distribute approximately 25.6 grams of heroin, a Schedule I narcotic drug controlled substance as charged in counts 1 and 2, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 8 years pursuant to T-18, U.S.C., Sec. 4208(a)(2) on each of counts 1 and 2 to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JACK B. WEINSTEIN
United States District Judge

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

v.

No. 72 CR 851

SAMUEL KAPLAN,

Defendant.

-----X

S I R :

PLEASE TAKE NOTICE that SAMUEL KAPLAN hereby appeals to the United States Court of Appeals for the Second Circuit from a Judgment of Conviction entered against him by the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, on April 26th, 1974, wherein the defendant was convicted of two counts of violating Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and sentenced upon the said conviction to

eight years on each of counts one and two to run concurrently.

Dated: New York, New York
April 26th, 1974

Yours, etc.

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant
SAMUEL KAPLAN
Office and P.O. Address
522 Fifth Avenue
New York, New York 10036
687-4100

By: _____
A Member of the Firm

TO:
HON. EDWARD L. BOYD, V.
United States Attorney
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Defendant's Home Address is:
50 Brighton 1st Road
Brooklyn, New York

Service of ^{Two 2)} three (3) copies of the within
is hereby admitted

this day of

.....
Attorney(s) for

RECEIVED
UNITED STATES ATTORNEY

JUN 25 3 54 PM '74

EASTERN DISTRICT
OF NEW YORK

